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ABSTRACT

On November 2, 1983, the subcommittee heard testimony concerning H.R. 3533 which would require the United States Court of Claims to hear eight claims originally filed against the United States Government by the Navajo Tribe in 1950 and later dismissed on technical grounds. The claims alleged that the Government improperly managed tribal resources and lands and violated the Treaty of 1868 by not dealing fairly and honorably with the Navajo Tribe in providing educational facilities and services required by law. Witnesses before the committee included Bill Richardson, Representative from New Mexico, who introduced legislation; Guy Gorman, Thomas Boyd, and Marshall Plummer from the Navajo Nation Claims Committee; William Schaab, the Tribe's claims attorney; and Anthony C. Liotta, Deputy Assistant Attorney General, who presented the Department of Justice's opposition to H.R. 3533. The bulk of this report consists of documents related to the complex 33-year history of the 8 claims and includes the Court of Claims opinion of June 13, 1979, the Navajo Tribe's petition for a review of that opinion, a 25-page summary of each claim, texts of the 1850 and 1868 treaties in question, and details of the controversial withdrawal of the claims in 1969 by a former tribal claims attorney. (JHZ)

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ED257591

CLAIMS AGAINST THE U.S. GOVERNMENT BY THE NAVAHO INDIAN TRIBE

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3533

CLAIMS AGAINST THE U.S. GOVERNMENT BY THE NAVAHO INDIAN TRIBE

NOVEMBER 2, 1983

Serial No. 67

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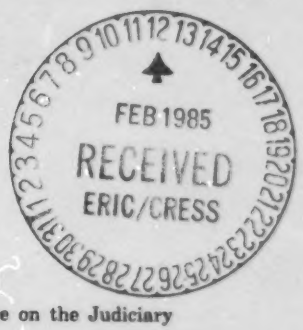

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CLAIMS AGAINST THE U.S. GOVERNMENT BY THE NAVAHO INDIAN TRIBE

WEDNESDAY, NOVEMBER 2, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to other business, at 3:45 p.m., room B-352, Rayburn House Office Building, Hon. Sam B. Hall, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Hall, Mazzoli, Boucher, Kindness, and Shaw.

Staff present: William P. Shattuck, counsel; Steve Douglass, assistant counsel; David Karmol, associate counsel; and Florence McGrady, legal assistant.

Mr. HALL. Our next case is H.R. 3533, to confer jurisdiction on the U.S. Claims Court with respect to certain claim to the Navaho Indian Tribe.

We are happy to have Mr. Bill Richardson with us; along with attorneys representing the Department of Justice, Mr. Anthony C. Liotta, Deputy Assistant Attorney General, Land and Natural Resources Division; William Schaab, Claims Attorney for the Navaho Indian Tribe; and Guy Gorman, Thomas Boyd and Marshall Plummer, representing the Navaho Nation Claims Committee. I am sure I did not pronounce any of the names properly.

Mr. RICHARDSON. You got mine, Mr. Chairman.

Mr. HALL. I have been with you all weekend in Beirut. I am glad to see you again in civilian clothes. It is a pleasure to have you, Bill. You are a very capable Member of this Congress. You just continue as you see fit.

TESTIMONY OF HON. BILL RICHARDSON, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Mr. RICHARDSON. Thank you very much, Mr. Chairman.

I have a very brief opening statement. I would just like to say I am very grateful and I appreciate the opportunity to appear before the subcommittee on behalf of a large segment of my population in the State of New Mexico. I have the largest Indian district of any Member of Congress.

Thank you again, Mr. Chairman. I am here to testify today on a bill I introduced, H.R. 3533, to require the U.S. Court of Claims to hear a number of claims which were filed against the U.S. Govern-

ment by the Navaho Indian Tribe. The Senate Select Committee on Indian Affairs held a hearing earlier today on a companion bill introduced by Senator DeConcini.

Let me give you a little background, Mr. Chairman. In 1950, the Navaho Tribe filed eight separate claims against the Government pursuant to the Indian Claims Commission Act of 1946. The claims alleged the Government improperly managed tribal resources and failed to deal fairly and honorably with the Navaho Tribe by not providing the educational facilities and services required by law.

However, these claims have never been heard by a U.S. court on their merits. They have never been heard. In 1969, the claims attorney for the tribe, Harold Mott, filed an amended petition which deleted several of the originally pleaded claims. The attorney contract with Mr. Mott required approval by the both the tribe and the Secretary of the Interior for any "compromise settlement, or other adjustment to the claims." Neither the tribe nor the Justice Department have any record reflecting consultation with or approval by the Interior Secretary and the tribe.

Subsequent to this action by Mr. Mott, the Indian Claims Commission and the Trial Division of the Court of Claims held that the Navaho's claims should be heard by the court on their merits. However, in 1979, the Court of Claims overturned these two earlier decisions and held that the tribe was bound by their attorney's "voluntary dismissal" of the claims 10 years previously.

After nearly 30 years of litigation, a fair hearing on a group of legitimate claims which were timely filed by the Navaho Tribe has been denied because of the unauthorized and irresponsible action of one participant. The Indian Claims Act of 1946 was enacted to insure that claims by the Indians were given the opportunity to be heard. It seems contrary to the purposes of this law and to basic principles of fairness and equity not to allow the Navaho's claims to be judged on their merits.

The bill I introduced, H.R. 3533, carries out the intent of the Indian Claims Act by insuring that the Navaho's claims will have the hearing contemplated by the act. This legislation does not make any judgment on these claims, but it will insure that the Navaho Tribe will have the opportunity to be heard.

Again, Mr. Chairman, I want to thank you for holding a hearing today on this important legislation. I will be happy, with the assistance of Mr. Schaab, to answer any questions any members of the subcommittee may have.

Again, Mr. Chairman, I think the issue is one of fairness. This piece of legislation makes no judgment whatever on the merits of the claims. It just allows the Navaho Nation to have a day in court. I hope that this committee sees fit to support this legislation. Thank you.

Mr. HALL. Thank you very much, Mr. Richardson. Again, thank you for being here today.

[The statement of Mr. Richardson follows:]

PREPARED STATEMENT OF HON. BILL RICHARDSON

Mr. Chairman, I want to express my great appreciation to you and the members of the subcommittee for holding this hearing today on a bill I introduced, H.R. 3533. To require the U.S. Court of Claims to hear a number of claims which were filed

against the U.S. Government by the Navaho Indian Tribe. The Senate Select Committee on Indian Affairs held a hearing earlier today on a companion bill introduced by Senator Dennis DeConcini.

In 1950, the Navaho Tribe filed eight separate claims against the Government pursuant to the Indian Claims Commission Act of 1946. The claims alleged the Government improperly managed tribal resources and failed to deal fairly and honorably with the Navaho Tribe by not providing the educational facilities and services required by law.

However, these claims have never been heard by a U.S. court on their merits. In 1969, the claims attorney for the tribe, Harold Mott, filed an amended petition which deleted seven of the originally pleaded claims. The attorney contract with Mr. Mott required approval by both the tribe and the Secretary of the Interior for any "compromise settlement, or other adjustment of the claims." Neither the tribe nor the Justice Department have any record reflecting consultation with or approval by the Interior Secretary and the tribe. Subsequent to this action by Mr. Mott, the Indian Claims Commission and the trial division of the Court of Claims held that the Navaho's claims should be heard by the court on their merits. However, in 1979 the Court of Claims overturned these two earlier decisions and held that the tribe was bound by their attorney's voluntary dismissal of the claims 10 years previously.

After nearly 30 years of litigation, a fair hearing on a group of legitimate claims which were timely filed by the Navaho Tribe has been denied because of the unauthorized and irresponsible action of one participant. The Indian Claims Act of 1946 was enacted to insure that claims by the Indians were given the opportunity to be heard. It seems contrary to the purposes of this law and to basic principles of fairness and equity not to allow the Navaho's claims to be judged on their merits.

The bill I introduced, H.R. 3533, carries out the intent of the Indian Claims Act by insuring that the Navaho's claims will have the hearing contemplated by the act. This legislation does not make any judgment on these claims, but it will insure that the Navaho Tribe will have the opportunity to be heard.

Again, Mr. Chairman, I want to thank you for holding a hearing today on this important legislation. I will be happy to answer any questions you or members of the subcommittee may have.

Mr. HALL. Mr. Schaab, you may have some comment.

TESTIMONY OF WILLIAM C. SCHAAB, CLAIMS ATTORNEY FOR THE NAVAHO INDIAN TRIBE; GUY GORMAN, NAVAHO NATION CLAIMS COMMITTEE; THOMAS BOYD, NAVAHO NATION CLAIMS COMMITTEE; AND MARSHALL PLUMMER, NAVAHO NATION CLAIMS COMMITTEE. ACCOMPANIED BY PAUL D. BARBER, COUNSEL

Mr. SCHAAB. Thank you, Mr. Chairman.

There are three members of the claims committee of the Navaho Tribal Council who testified this morning on the related bill in the Senate. I believe that they would like to present brief statements that they have.

Mr. HALL. Let's let them come up to the table and slide the microphone back and forth between them.

Please identify yourselves for the record.

Mr. GORMAN. Mr. Chairman, my name is Guy Gorman. I am the senior member of the committee on tribal claims, appointed by the advisory committee of the Navaho Tribal Council. I have been authorized to present this statement on behalf of the Navaho Nation by Chairman Peterson Zah and the claims committee.

I would like at this time to introduce the other two members on the claims committee. On my right is Marshall Plummer, a councilman from Coyote Canyon Chapter; and on my left is Thomas Boyd, a councilman from Crystal, N. Mex., a councilman for that chapter.

Mr. SCHAAB. Before you proceed, Mr. Chairman, will the statements submitted by the Navaho representatives be considered to be part of the record?

Mr. HALL. They will be made a part of the record.

Mr. SCHAAB. So if you present a summary of your statement, it will be sufficient.

Mr. GORMAN. Thank you, Mr. Schaab. Mr. Chairman, that was going to be part of my next statement. Thank you, Mr. Schaab.

We, as members of the tribal council, have always been very concerned about this matter. I can assure you that the council was never informed when the second claims attorney withdrew the seven claims case.

It is so important to the Navaho Nation, because one of the claims is in education. During my growing up days, we have never had an opportunity to get an education that maybe I should have. Maybe today I would have been a lawyer, doctor or something. However, the only English that I am using right now today is what I picked up in the U.S. Army, where I didn't have any choice but to talk English.

So, to us, we feel that these are some of the things——

Mr. HALL. You are doing good. You just keep on. You are doing fine.

Mr. GORMAN. The treaty of 1868 definitely states that there will be a teacher for every 30 kinds in the classroom. This was a promise that is in the treaty. We still kind of hold to the Government that this was never done.

Mr. Chairman, we are just requesting that we have a day in court and also to have an honorable deed be carried by the U.S. Government.

Thank you very much.

Mr. HALL. Thank you, sir.

[The statement of Mr. Gorman follows:]

BEFORE THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ADMINISTRATIVE LAW & GOVERNMENTAL RELATIONS

HEARING ON HR 3533, NOVEMBER 2, 1983

STATEMENT ON BEHALF OF NAVAJO NATION

Mr. Chairman:

My name is Guy Gorman. I am the Senior Member of the Committee on Tribal Claims appointed by the Advisory Committee of the Tribal Council. I have been authorized to present this statement on behalf of the Navajo Nation by Chairman Peterson Zah and the Claims Committee.

The Navajo people are asking Congress to correct the failure of the United States, as our trustee, to protect our right to obtain a fair hearing on our "fair and honorable dealing" claims that were properly filed under the Indian Claims Commission Act more than 30 years ago. In 1979 the Court of Claims held that these claims had been dismissed by an amendment filed by our second claims attorney despite the fact that the Tribe and the Secretary of the Interior had never approved such action, as required by the attorney's contract.

Our principal "fair and honorable dealings" claim was that the Government failed to keep its historic promises in our 1868 treaty to give Navajo children the opportunity for an education. Every Navajo realizes the great misfortune suffered by the Tribe because the Government reneged on its promise over 100 years ago. When I was growing up, most Navajo children didn't go to school because there were only a few schools and they were overflowing.

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Even fewer Navajos in my parents' generation had schools to attend.

Lacking an eduration, we could only look to the Government as our trustee to manage our resources, but the trustee made many mistakes over the years. When Congress in 1946, for the first time, gave the Navajos the right to bring these wrongs before the Indian Claims Commission, we did so. Maybe we thought, some good will come of these claims, and we will be able to educate ourselves. In fact, we have allocated a good part of the first two recoveries on these claims for scholarships and other educational uses. Unfortunately, those funds are far too small in comparison to our needs. The great bulk of our people still live in poverty, in the remote desert, without local schools and with nothing but rough dirt trails for busing to distant schools.

Now it seems that the right to a full hearing granted us by Congress 35 years ago on the Government's failure to give us the educational benefits of the 1868 Treaty, and the hope for some compensation to help undo past wrongs, have been taken away by new wrongs. Our "fair and honorable dealings" claims have been thrown out on a technicality in a way that neither Congress nor the Tribe ever intended.

In 1969, without Tribal approval or consent, the second claims attorney for the Tribe filed an amended petition in one of the cases (Docket No. 69) which deleted seven paragraphs, and "withdrew" Claims 1 through 6 and Claim 8.[1] That action violated Section 6 of the claims attorney's contract,[2] which required

approval by both the Tribe and the Secretary of the Interior for any "compromise, settlement, or other adjustment of the claims." Although the Secretary had required such a provision in the attorney's contract for the Tribe's protection,[3] the Department of Justice neither informed the Secretary of the claims attorney's action nor advised to Commission that the Secretary had not approved such action.

The claims attorney has advised the Committee[4] that he acted under pressure from the Department of Justice to "consolidate" the claims originally pleaded in eight separate counts, and that he did not intend to dismiss any claim originally presented by the Petition. Since the attorney never advised the Tribe of his "amendment" of its Petition, the Tribe was unable to act for its own protection.

That situation was precisely the kind calling for the Government, which did know of the attorney's action, to exercise its oversight function under 25 U.S.C. § 81a. The Department of Justice should have called the "withdrawal" of seven claims to the attention of the Tribe and the Secretary of the Interior and demanded their review and approval in accordance with the attor-

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1 Exhibit A, p. 57a.

2 Exhibit A, p. 54a.

3 Exhibit A, p. 56a. The Secretary acted under Congress' mandate in 25 U.S.C. § 81a to supervise tribal attorney contracts.

4 Exhibit B.

ney's contract. Instead, Justice let the matter lie dormant until the claims attorney had been replaced; then it claimed his action was a voluntary dismissal of important claims that cannot now be considered on their merits.

In other cases, such as the overlapping land claim areas of the Jicarilla Apache Tribe and certain Pueblos,[5] the Justice Department objected to an agreement between attorneys that reduced the Jicarilla's claim area because the Secretary had not given his approval. The Justice Department itself agreed that "the attorney...is prohibited from making any adjustment of any claim pending on behalf of the tribe without the approval of the Commissioner of Indian Affairs." The attorneys then obtained the approval of the Commissioner, and the Claims Commission accepted the agreement as valid.[6] Although the Navajo Tribe's claims attorney's contract had a provision like the Jicarilla's, the same caution was not observed in the Navajo cases. Instead, the Department of Justice took advantage of our attorney's unauthorized action for the Government's benefit.

In this hearing, the Department suggests that its failure to demand Tribal and Secretarial approval of our attorney's "withdrawal" of our claims should be excused because the Commission held in the Jicarilla case that tribal attorneys are free to

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[5] Exhibit C.

[6] Exhibit D.

correct "mistakes" in a pleading without such approval. Yet the Department did not treat our attorney's action as correcting a pleading "mistake"; it pressed for a court decision that he had deliberately dismissed our claims. In 1974, five years after the unauthorized amendment of the petition, after our third and present claims attorney moved to amend the petition to restore to it all of our claims, the Justice Department asked the Indian Claims Commission to enter final judgment dismissing the "withdrawn" claims. The Commission denied that request because the 1969 amendment had not been approved by the Tribe or the Secretary, and a new amendment was allowed to restore all of the claims that had been originally filed before the deadline of August 13, 1951. The Government then moved to dismiss Claims 1 through 6 and Claim 8 on the technical ground that they were presented after the 1951 cutoff date.

After transfer of the case to the Court of Claims, the Trial Judge filed his opinion in 1978 upholding the Commission's approval of the Tribe's revised petition. But the Justice Department appealed to the Court, and on June 13, 1979, the Court dismissed Claims 1 through 6 and Claim 8. The Court held that the attorney's contract required tribal and Secretarial approval only where some payment was made to the Tribe. We think the Court's holding is absurd: the trustee's approval must be given if claims are settled for a sum of money, but no approval is needed if the attorney gives up claims without any payment whatever. The U.S. Supreme Court refused on February 19, 1980, to hear our appeal.

In this way, the Department of Justice took advantage of the Government's failure to review our attorney's unauthorized action and, as our trustee, to protect the Tribe from loss of its valuable claims. The Department flouted both the requirements of 25 U.S.C. § 81a and our attorney's contract for its own benefit, and only Congress can correct that error.

The present bill, HR 3533, will merely allow the Tribe to obtain a hearing on the dismissed claims in the case still pending before the U.S. Claims Court. The claims were properly filed before the 1951 deadline. No withdrawal was authorized, and they should not have been dismissed. The Tribe is entitled to have them considered by the Court once and for all on their merits.

The bill is carefully drawn to prevent the Tribe from obtaining a double hearing on claims now pending before the Court under the Seventh "general accounting" Claim, or on those that have been determined on their merits. In 1979, the Justice Department took the position on a motion to the Court for clarification [7] and in a later appeal in the "general accounting" docket that none of the dismissed claims could be considered in the remaining Seventh Claim. In May, 1980 the Court rejected the Government's argument, allowing all claims based on breach of the Government's fiduciary duty to the Tribe to be heard under Claim 7 notwithstanding their

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[7] Exhibit A, p. 9a.

inclusion in Claims 1 through 6. But with respect to "fair and honorable dealing" claims under clause (5) of §2 of the Claims Commission Act [25 U.S.C. §70a], the Court held:[8]

> "Fair and honorable dealing" claims, not involving the Government's management and use of Navajo assets, do not come at all under claim 7.

Those claims were, therefore, finally dismissed by the 1969 Amended Petition and cannot be considered unless Congress passes this bill.

The bill will allow the Navajo Tribe to obtain a hearing before the U.S. Claims Court on its dismissed claims and thus carry out the intent of the Indian Claims Commission Act. The legislative history of that Act shows that Congress meant to have tribal claims heard and decided on the merits, and that tribes could recover whenever the facts showed that, in good conscience, recovery was justified. Congress expected, as the Report of the House Committee on Indian Affairs [H.R. Rep. No. 1466, 79th Cong., 1st Sess.] stated:

> "...that an impartial determination of the facts will in many, if not in most, cases eliminate the need for further legal proceedings by showing either that there is no basis whatever for recovery on the part of a given tribe or that such recovery, if indicated, does not involve any controverted legal principles."[9]

The comments of the Department of Interior on the bill, printed in

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[8] Exhibit E, p. 8.

the House Report, pointed to the "lack of finality attending dismissal of a case by the Court of Claims on technical legal grounds without consideration of the claims on its merits" and suggested that authority to try "moral claims" as well as strictly legal or equitable claims "would overcome the defect in the present system under which many of the claims of the Indians are precluded from a hearing on the merits, on technical legal grounds, even though the claims may be such as would challenge the conscience of a court of equity."[10] The Department repeatedly stressed the Commission's "power to consider the merits of all existing Indian Tribal claims."[11] and to overcome technical legal barriers to trial. The Court of Claims' dismissal of the Navajo claims by a technical and unnecessary interpretation of the claims attorney's contract, was thus entirely wrong and contrary to the intent of the Act. We ask prompt passage of HR 3533 to correct that error and prevent adding a new wrong to the deprivations still suffered by our people.

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9 Page 13.

10 Page 15.

11 Page 16.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ——

THE NAVAJO TRIBE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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November 9, 1979

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THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Navajo Tribe petitions for a writ of certiorari to review the Opinion of the United States Court of Claims dated June 13, 1979, and the Order entered on petitioner's motion for clarification of that Opinion.

OPINIONS BELOW

This case involves the arbitrary dismissal of valuable claims against the United States in derogation of safeguards mandated by Congress for the protection of tribal claimants under the Indian Claims Commission Act. The Opinion of the Court of Claims (Appendix A) is reported at 601 F.2d 536 (1979). The Order (Appendix B) is unreported.

JURISDICTION

The Opinion below was entered on June 13, 1979. Petitioner filed a motion for clarification of the Opinion on September 4, 1979, and on September 11, 1979, the Chief Justice extended the time for filing this petition to November 10, 1979 (No. A-206). The Order on the motion for clarification was entered on September 28, 1979. The Court's jurisdiction is based upon 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims misconstrued its jurisdiction under the Indian Claims Commission Act to bar seven counts of an eight-count petition after their unauthorized "withdrawal" by petitioner's claims attorney in violation of his attorney's contract, which required prior approval by the Tribe and the Secretary of the Interior of any compromise, settlement or adjustment of a claim.

2. Whether the "withdrawal" of seven counts of an eight-count petition affects jurisdiction over claims stated by the remaining count, by barring all issues that may also have been presented by the "withdrawn claims."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the United States Constitution involved is the Fifth Amendment, which provides in relevant part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Congress mandated safeguards for tribal claimants under Section 15 [25 U.S.C. § 70n] of the Indian Claims Commission Act of August 13, 1946, c. 959, P.L. 79-726, 60 Stat. 1049, 1053, (the "Act"), which reads as follows:

> "§ 70n. Attorneys of claimants; selection, practice and fees; Attorney General to represent United States; compromise of claims.
>
> "Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 476 of this title, shall be selected pursuant to the constitution and by-laws of such tribe, band or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 81, 82, 83 and 84 of this title.

> "The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title."

Petitioner is not organized under the Indian Reorganization Act, 25 U.S.C. § 476; therefore, its contract with its claims attorney is required to be approved by the Secretary of the Interior under 25 U.S.C. §§ 81 to 84. Section 81 provides in pertinent part:

> "No agreement shall be made by any person with any tribe of Indians, . . . for the payment or delivery of any money or other thing of value . . . in consideration of services for said Indians relative to their lands, or to any claims . . . in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it. . . ."

The Secretary required in the attorney contract that any compromise, settlement, or other adjustment of petitioner's claims be approved by his delegate and the Tribe.

STATEMENT OF THE CASE

Petitioner is by far the largest Indian tribe in the nation, with a population of approximately 150,000 or about one-fourth of the total American Indian population, and a reservation of 13 million acres encompassing lands in the states of Arizona, New Mexico and Utah. The magnitude and complexity of the Tribe's claims against the United States, as well as of its general legal problems, are commensurate with its extraordinary size. The claims dismissed by the decision below have been appraised by petitioner's expert witnesses well in excess of a hundred million dollars.

Petitioner timely filed its Petition under the Indian Claims Commission Act on July 11, 1950, as Docket No. 69 (Appendix C). The Petition contained eight counts or "claims" consisting of 29 numbered paragraphs plus a general prayer for relief in paragraph 30. Each count incorporated by reference the factual allegations of the preceding counts. Claims 1 through 6 and Claim 8 alleged specific breaches of treaties or fiduciary obligations by the United States and sought damages for the alleged breaches. Claim 7 alleged a trust or guardian-ward relationship between the Government and the Navajo Tribe and demanded a complete accounting of the Government's handling of tribal property and money which it held in trust. To the extent that the accounting sought in Claim 7 would reveal breaches of treaty or fiduciary duties that were specifically alleged in Claims 1 through 6 and Claim 8, Claim 7 presented an alternative theory for relief, i.e., a suit for an accounting instead of an action for money damages.

Respondent never answered the Petition. On August 8, 10 and 11, 1951, petitioner timely filed petitions

docketed, respectively, as Nos. 229 (land claim), 299 and 353 (receipts accounting for certain resources), which reiterated some of the allegations of the Petition in No. 69. Because of the magnitude and complexity of the claims, petitioner's first claims counsel, Normal Littell, entered a stipulation with the Government providing that prosecution of claims in Nos. 69, 299 and 353 would be deferred pending completion of the land claim in No. 229.

In 1966, after lengthy litigation culminating in a decision of the United States Court of Appeals for the District of Columbia Circuit upholding the Secretary's supervisory power over tribal attorneys' contracts, Mr. Littell was fired from his position as general counsel for the Tribe by the Secretary of the Interior. *Udall* v. *Littell,* 366 F.2d 668 (D.C. Cir. 1966). Mr. Littell resigned as claims attorney shortly thereafter, on February 20, 1967. His successor, Harold Mott, also was permitted to assume the dual role of petitioner's general counsel and, by separate contract, claims counsel. His claims contract was approved by the Secretary of Interior on November 21, 1968. Section 6 of that contract (Appendix D) required that:

> "[a]ny compromise, settlement or other adjustment of a claim of the Tribe shall be subject to the approval of the TRIBE and the SECRETARY [of the Interior]." Appendix D at 5.

During the hiatus after respondent fired petitioner's first claims attorney, but before it approved the second, respondent filed (on November 14, 1967) in No. 69 a "Motion to Require Petitioner to Set Out in Separately Numbered Petitions the Claims Pleaded in the Original Petition or, in the Alternative, to Dismiss

the Petition." A response to that motion was not filed because petitioner had no attorney of record, and respondent then moved (on March 11, 1968) to dismiss the Petition for failure to prosecute. After approval of his contract, petitioner's second claims attorney responded (on December 13, 1968) to the latter motion, requesting an extension of time to respond to the earlier motion. On December 23, 1968, the Commission denied the motion to dismiss and gave petitioner nine months "to amend the petition" in No. 69.

On October 1, 1969, petitioner's claims attorney filed a First Amended Petition in No. 69 (Appendix E), as follows:

> "The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims."

The deleted paragraphs comprised particular allegations of damages; none of the allegations of fact was deleted, nor was the general prayer for relief at paragraph 30. The withdrawal of "claims" was not approved by petitioner or by the Secretary of the Interior. Respondent filed its Answer to First Amended Petition on November 4, 1969, but it did not seek entry of a final judgment dismissing the seven "withdrawn" claims, and the claims were never actually dismissed before the Opinion below.

On July 25, 1973, the Commission consolidated No. 69 with Nos. 299 and 353 because "plaintiff's allegations in Docket Nos. 299 and 353 clearly overlapped those filed in Docket No. 69." 31 Ind. Cl. Comm. 40, 41-42. On respondent's motion for rehearing (raising

other issues), the Commission confirmed the consolidation in its 1973 Opinion. 34 Ind. Cl. Comm. 432 (1974).

Petitioner's second claims attorney's contract expired on June 30, 1972, and after another hiatus its third and present claims attorney entered his appearance on September 21, 1973. 34 Ind. Cl. Comm. 432, 433.

Petitioner moved on July 1, 1974, to amend the First Amended Petition in No. 69 by restating the withdrawn paragraphs of the first six claims. Respondent's response to that motion on July 18 for the first time asked for entry of final judgment dismissing the first six and eighth claims. The Commission granted petitioner's motion to "reformulate" the first six claims in No. 69 and denied respondent's motion for final judgment. Opinion dated January 23, 1975, 35 Ind. Cl. Comm. 305 (Appendix F). That opinion ordered that the consolidated dockets be separated into two separate dockets, the first denominated No. 69 (Claims 1 through 6 and Claim 8), and the second Nos. 69, 299 and 353 (Accounting Claims), which included the seventh claim in No. 69. Respondent's motion to certify the Commission's action to the Court of Claims was denied on July 9, 1975, 36 Ind. Cl. Comm. 215.

Respondent then filed (on June 3, 1976) a motion to dismiss or for more definite statement addressed to the Second Amended Petition in No. 69 (Claims 1 through 6 and Claim 8), which remained undecided when the docket was transferred to the Court of Claims pursuant to P.L. 94-465, 90 Stat. 1990 (1976) [providing for termination of the Commission at September 30, 1978]. The Trial Judge to whom the matter was assigned held in his Opinion of January 23, 1978, that the motion was an untimely motion for rehearing but denied it on the

merits insofar as it challenged the reformulation of Claims 1 through 6. (The first 12 pages of the Trial Judge's Opinion are annexed as Appendix G.)

On review, the Court of Claims on June 13, 1979, rejected the Trial Judge's Opinion and dismissed Claims 1 through 6 and Claim 8 (Appendix A). The Court of Claims held that the contractual requirement for Tribal and Secretarial authorization of adjustments in claims did not apply to the complete withdrawal of claims, and that the unauthorized withdrawal of claims which were never actually dismissed nonetheless created a jurisdictional bar to consideration of those claims on their merits.

Questions raised during a conference with the Trial Judge pertaining to proceedings in Dockets 69, 299 and 353 (Accounting Claims, including Claim 7) led the Trial Judge to advise petitioner to seek clarification of the Court's Opinion of June 13, 1979. Accordingly, petitioner asked the Court (on September 4, 1979) to clarify whether issues presented by the allegations preserved in the seventh claim were affected by the dismissal of the first six claims.[1] By Order of September 28, 1979, the Court held that such dismissal "precluded plaintiff from subsequently reasserting those claims" as issues of the seventh claim.

REASONS FOR GRANTING THE WRIT

The Court of Claims below misconstrued its jurisdiction under the Indian Claims Commission Act, 25 U.S.C. § 70k, by dismissing before trial Claims 1 through 6 of the original Petition and thereafter con-

[1] Claim 8 was not reformulated and is of no relevance in this proceeding.

struing that dismissal as precluding adjudication of issues in Claim 7 that were never dismissed by the petitioner. The Court failed to give effect to explicit safeguards in the Special Claims Contract between petitioner and its attorney prescribed by the Secretary of the Interior under 25 U.S.C. § 81 for the protection of the Tribe. That failure violates the mandate of Section 15 of the Indian Claims Commission Act for protection of tribal interests in the adjudication process. The Court also ignored long-established precedents of this Court and of the Circuit Courts requiring clear authority before an attorney's dismissal of claims against his client's interest can be given effect. Moreover, the Court erroneously construed the intent and effect of the First Amended Petition, guillotining valuable tribal claims before trial when such a result was not intended or approved by petitioner, thus depriving petitioner of due process of law. Finally, the Court reached beyond the matters raised by respondent's motion to dismiss Claims 1 through 6 and Claim 8 and arbitrarily stripped from Claim 7 in a wholly separate docket all issues that may be found within the first six claims. That action not only deprived petitioner of due process of law in the accounting docket but creates such uncertainty that orderly adjudication of its accounting claims may become impossible. Each of these reasons is discussed briefly below.

1. Jurisdiction Misconstrued; Special Claims Contract Ignored; Conflict with Established Precedents.

In Section 15 of the Indian Claims Commission Act, 25 U.S.C. § 70n, Congress allowed each tribe to choose its claims attorney, but it carefully safeguarded the tribe by requiring the Secretary of the Interior to

approve the attorney's contract under 25 U.S.C. § 81. That 1871 statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227 (1893). As the note (by a member of the Commission's staff) annexed to the Special Claims Contract states (Appendix D), the Secretary rejected the first version of the contract and required certain amendments for the Tribe's protection.

Section 6 of the Special Claims Contract stated:

> "6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY."

The First Amended Petition did not have the required approvals.

The Indian Claims Commission, upon the Tribe's motion to reinstate the claims which its prior attorney had purported to withdraw, found that he lacked authority to withdraw the claims. It is also clear that the United States, in its supervisory capacity over this attorney's contract knew of his lack of authority. The Commission stated, 35 Ind. Cl. Comm. 305, 307, fn. 2 (Appendix F):

> "The attorney contract in effect with the Navajo Tribe at the time of the amended petition of 1969 required that any adjustment of plaintiff's claims by plaintiff's attorneys would be subject to the approval of the tribe. The record does not indicate that this requirement, which would presumably be applicable to an amendment withdrawing several claims, was met."

The Commission, therefore, allowed the Claims to be reinstated in the form of a Second Amended Petition.

The Trial Judge also treated "voluntary withdrawal" of previously pleaded claims as an adjustment of the Tribe's claims requiring approval in accordance with the contract [Appendix G].

However, the Court of Claims construed Section 6 of the Contract

> " . . . as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, *i.e.*, the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, *several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons.* That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract 'to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract.' Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action." [App. A; italics added.]

That construction is absurd. There is no basis whatsoever for the Court's italicized speculation that the claims were withdrawn because they were duplicated in other dockets and their withdrawal in No. 69 would achieve some advantage for the petitioner.

The Court's conclusion that the attorney had authority to dismiss the petitioner's multi-million dollar claims ignored long-established precedents of this Court and of the Circuit Courts requiring clear evidence of an attorney's authority to dismiss valuable

claims against his client's interest. In *Holker v. Parker*, 11 U.S. (7 Cranch) 436, 452-453 (1813), Chief Justice Marshall explained:

> " . . . Has the attorney a right to make such a compromise?
>
> "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, *there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party.* Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining." [Italics added]

See also *United States v. Beebe*, 180 U.S. 343 (1901); *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136 (10th Cir. 1966).

That fundamental principle must be applied with greater care where an Indian tribe is involved and its attorney's contract expressly denies authority to dismiss claims without double approval. If the attorney's withdrawal of claims was intended as a dismissal of the claims with prejudice, the safeguards of paragraph 6 of the Special Claims Contract were clearly necessary.

For such a broadscale dismissal deprived petitioner of its right to a complete adjudication under the Act of the valuable claims framed in its timely Petition. There was no conceivable "tactical or strategic" reason for such an action; an attorney who would finally abandon such claims would be patently incompetent. Section 6 was required by the Secretary precisely to protect petitioner from such an eventuality.

The Court's recognition that Section 6 required both tribal and secretarial approval for a "termination of claims in return for some consideration given in exchange therefor" is shockingly inconsistent with its conclusion that these valuable claims could be terminated without such approval *because* the Tribe received nothing in exchange. Had the Government paid a peppercorn for termination of these same claims, the attorney's consent would have been void without the required double approval. Cf. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 320 (1927); *Green v. Menominee Tribe*, 233 U.S. 558, 570-571 (1912). Surely, Congress' insistence on basic safeguards of tribal interests in claims litigation demands that the Contract's requirements be met when valuable claims are abandoned without any consideration whatever.

When in 1968 the Court of Claims was confronted with the results of incompetent representation of the Sioux Tribe in a claims case, it took the extraordinary step of vacating its 1956 affirmance of a Commission decision against the Tribe after trial on the merits and remanded to the Commission for reopening of proof. *Sioux Tribe v. U.S.*, 146 F.Supp. 229 (1956), *vacated*, 182 Ct. Cl. 912 (1968). How different was its summary disposition of these valuable Navajo claims, where Section 15 of the Act and Section 6 of petitioner's Spe-

cial Claims Contract required specific action to prevent manifest injustice to the petitioner through the incompetence of its attorney.

If the Court of Claims was right in viewing the withdrawal as a voluntary dismissal of these claims, the First Amended Petition must be treated as a wholly unauthorized "adjustment" of the claims and of no legal effect.

2. Misinterpretation of Amended Petition.

The First Amended Petition in No. 69 did not in terms state that petitioner was voluntarily dismissing seven of the eight claims in its original Petition. That effect was arbitrarily attributed to the amendment by the Court of Claims; it is inconsistent with its language and with its intention. The Court admitted that the amendment was "not in form, a voluntary dismissal of the plaintiff's nonaccounting claims in Docket No. 69." [Part III of Opinion; App. A.] However, the Court had no reason nor basis in the record to construe the language of the amendment—deleting the specific paragraphs that characterized each "claim" and "withdrawing [those claims] from consideration herein"—as a voluntary dismissal of several causes of action. The Commission had correctly interpreted the amendment according to its plain terms:

> " . . . plaintiff's first amended petition, which purported to withdraw seven of plaintiff's claims, did not delete the allegations of fact which were the substance of those claims. Moreover, plaintiff's seventh claim, which clearly remained after the amended petition of 1969 was filed, stated that plaintiff 'restates and reaffirms each and every allegation of fact' of the original petition." 35 Ind. Cl. Comm. 305, 307 (Appendix F).

The "claims" withdrawn were merely the general allegations of damages in the deleted paragraphs; the causes of action defined by the factual allegations of the other paragraphs and the general prayer for relief were intentionally left unaffected. The amendment was thus intended to be a restructuring of the Petition, not a dismissal of causes of action, in response to respondent's motion of November 14, 1967 that demanded "separately numbered Petitions of the claims pleaded in the original Petition."

Moreover, a reorganization of the original pleading was fully authorized by the Commission's Rules, which did not require separate "petitions" for each "claim." Rule 7(a) stated:

> SEC. 7. *General rules of pleading.*
>
> (a) *Pleading to be concise and direct; consistency.* (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.
>
> (2) *A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.* When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and regardless of the nature of the grounds on which they are based. All statements shall be made sub-

> ject to the obligations set forth in Sec. 10(b) [requiring the attorney to believe "good ground" supports the pleading]. [Italics added]

The First Amended Petition, submitted before answer under Rule 13(a)(1) which allowed the restructuring of claims as a matter of course, combined eight separate claims into one.

As long as the factual allegations of the Petition remained, it was incorrect to construe the amendment as a voluntary dismissal of any claims covered by those allegations, by the damages paragraph (¶ 27) of the seventh claim, and by the general prayer for relief in paragraph 30. The Court's arbitrary refusal to consider the plain language of the Petition remaining after the amendment is clear in footnote 3 to the Opinion (App. A):

> The plaintiff challenges characterization of the issue as jurisdictional. It argues that, since it withdrew only the prayers for relief and not the claims themselves, those claims were "subsumed" under the comprehensive prayer for relief of paragraph 30 and under claim 7's incorporation of preceding factual allegations. As noted above, however, the withdrawn paragraphs were not merely prayers for relief, and *claim 7 incorporated only general recitations of fact.* Moreover, the Commission recognized that the claims in question were withdrawn, not subsumed in the surviving claim. *Navajo Tribe v. United States,* 31 Ind. Cl. Comm. 40, 41 (1973). [Italics added.]

The "general recitations of fact" incorporated in Claim 7 comprise the causes of action (*i.e.*, the facts entitling plaintiff to the relief sought in paragraph 30) pleaded by the original timely Petition, and the Com-

mission's 1975 Opinion (quoted above) so held, rejecting its 1973 reference to "withdrawn" claims cited by the Court.

The word "claims" in the First Amended Petition is ambiguous: It is not clear whether it refers merely to the allegations of damages in the deleted paragraphs or, more broadly, to all causes of action presented by the preceding factual allegations. The Court arbitrarily seized upon the broader interpretation, contrary to the long-established rule that Indian tribes must receive the benefit of any doubt on questions of intent or in the interpretation of documents affecting their interests. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552-558 (1832); *United States v. Kagama*, 118 U.S. 375, 383-384 (1886); *Marlin v. Lewallen*, 276 U.S. 58, 64 (1928); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164, 174-175 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). In *Santa Rosa Band v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), the Court said:

> "This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretative device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes."

The principle was recognized by the Attorney General in 34 Op. Atty. Gen. 439, 444 (1925):

> "From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to questions of fact or the construction of treaties and statutes

relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) [25 U.S.C. § 194], which provides:

> 'In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.'

This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

That principle was mandated by Section 6 of Special Claims Contract and Congress' establishment of protection for tribal claimants under Section 15 of the Act and 25 U.S.C. § 81. The Court of Claims' arbitrary refusal to apply it amply justifies issuance of the writ.

3. Unwarranted Emasculation of Seventh Claim.

The Order entered on petitioner's Motion for Clarification (and footnote 3 of the Opinion) precludes trial of any "claims" withdrawn in No. 69 unless they were pleaded in Nos. 229, 299, or 353. The unwithdrawn seventh claim in No. 69, which has been consolidated with Nos. 299 and 353 since the Commission's Order of July 25, 1973, is thus stripped of a large portion of its well-pleaded issues. The allegations of the Seventh Claim, which were not deleted by the First Amended Petition, include all of the factual allegations of the first six claims, as the Commission held. Yet the Court

of Claims held that the withdrawal of the first six "claims" jurisdictionally bars their adjudication as surviving elements of the seventh claim. That unsupportable holding is wholly arbitrary and capricious.

The Commission's Rule 7 expressly permitted petitioner to plead multiple claims or counts in a single petition. Under Rule 54(b) of the Federal Rules of Civil Procedure voluntary withdrawal or dismissal of one or more multiple claims has no effect on the remaining claims. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 431 (1956). The Commission's Rule 7 indicated that those elementary principles of due process were applicable in practice before the Commission, and the Court of Claims was bound thereby.

Furthermore, the Court's ruling that allegations of Claims 1 through 6 which overlap those of Claim 7 are barred from Claim 7 was made in a docket separate from the docket of Claim 7. The Court's ruling was made in "Docket No. 69 (Claims 1 through 6 and Claim 8)" as established by the Commission on January 23, 1975 (App. D, p. 310). The seventh claim was not part of that docket but was separately consolidated by the Commission on July 25, 1973, as "Nos. 69, 299 and 353 (Accounting Claims)." (The Commission's discretion to consolidate or separate claims was confirmed in *United States v. Ft. Sill Apache Tribe,* 209 Ct. Cl. 433, 533 F.2d 531 (1976)). In the Order of September 28, the panel of judges in "Docket No. 69 (Claims 1 through 6 and Claim 8)" ruled, in effect, that its June 13 Opinion would be *res judicata* as to claims or issues pleaded in "Docket Nos. 69, 299 and 353 (Accounting Claims)." Under established practice, the panel in the Accounting Claims docket would decide whether *res*

judicata in fact constituted a defense to claims well-pleaded therein. The September 28 Order apparently deprives that panel of its normal authority.

The Court's Order was thus a clear misapplication of the principles of *res judicata*. Without doubt, *res judicata* is a defense which must be pleaded in the case following the adjudication (here Docket Nos. 69, 299 and 353 (Accounting Claims)), and the Court must determine whether the elements of that defense are in fact present. One of those elements, prior adjudication of a cause of action on the merits, is obviously not present with respect to the withdrawn claims. Therefore, the doctrine of *res judicata* could not be raised as a bar to adjudication of any of the withdrawn claims that had been timely pleaded as elements of the seventh claim. RESTATEMENT OF JUDGMENTS § 48 (1942). There is no other doctrine under which such adjudication would be barred, and the Court's erroneous ruling thus deprived petitioner of due process of law.

Claim 7, embracing all factual allegations incorporated by reference and the prayer for relief in paragraph 30, was timely presented, and none of the elements of that claim is barred by the limitation of § 12 of the Act, 25 U.S.C. § 70k. Since all factual allegations of the first six claims are incorporated in Claim 7, all causes of action based on those allegations were presented timely and remain justiciable. The Commission's discretionary allowance of an amendment of the Petition to "reformulate" those causes of action within the liberal notice requirements of *Snoqualmie Tribe v. United States*, 178 Ct. Cl. 570, 372 F.2d 951 (1967), was clearly proper. The Court of Claims interpretation of "claims" as including all factual predicates of the first six claims is contrary to the terms of the First

Amended Petition which did not delete or withdraw any factual allegations, and the Court's conclusion is not supported by any other analysis or authority. Therefore, the Court's Order barring adjudication as an element of Claim 7 of any issue constituting a part of the first six claims is wholly arbitrary.

Moreover, the Order creates immense procedural obstacles to the prompt adjudication of Claim 7, which has already been pending for 29 years. Respondent will argue that each triable issue in Claim 7 is barred because it is one of the issues that might have been adjudicated under the first six claims. Already, respondent has taken that position on a score of "accounting" issues, and there are literally hundreds more. The accounting claim will predictably be mired in such sophistry for years to come, again depriving petitioner of its right to full and prompt disposition of its claims under the Act.

CONCLUSION

The writ should issue in this case to uphold Congress' mandate for protection of tribal claimants under the Act, to make effective the provisions of the Special Claims Contract requiring prior approval of any compromise, settlement, or adjustment of petitioner's claims by its attorney, to expunge the Court of Claims' misconstruction of its jurisdiction under the Act and its refusal to follow established precedents of this Court, to construe and apply the pleadings presenting petitioner's claims in accordance with their plain language, the Tribe's obvious intent to obtain prompt adjudication of all claims, and the principle of liberal interpretation for the benefit of the tribe, and to correct the arbitrary dismissal of claims by the Court of Claims. There was manifest injustice below, which the Navajo Tribe asks this Court to review and reverse.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 69

(Decided June 13, 1979)

THE NAVAJO TRIBE OF INDIANS v. THE UNITED STATES

William C. Schaab, attorney of record for plaintiff. *Rodey, Dickason, Sloan, Akin & Robb, Paul D. Barber*, and *Sarah W. Barlow*, of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and SMITH, *Judge*.

OPINION

FRIEDMAN, Chief Judge, delivered the opinion of the court:

This case, byzantine in complexity, has been transferred from the Indian Claims Commission pursuant to Pub. L. No. 94–465, 90 Stat. 1990 (1976), and is now before us on the parties' requests for review of two rulings of Trial Judge C. Murray Bernhardt. In those rulings the trial judge resolved various contentions of the parties regarding the interrelationship of claims pending in various Commission dockets and the status of certain claims in this case.

We find it unnecessary to resolve most of those contentions since we conclude that the plaintiff voluntarily withdrew all of the claims involved in this case after the applicable limitations period had run, and that those claims therefore are time barred. Accordingly, we dismiss claims one through six and claim eight of the petition.[1]

I.

The original petition in this case, filed with the Indian Claims Commission in July 1950, as Docket No. 69, contained eight claims. Each claim consisted of (1) a general recitation of facts, and (2) a paragraph stating the claim arising from those facts. The initial paragraph of claims two through eight incorporated by reference the general recitations of fact stated at the beginning of the preceding claims. Paragraph 30 of the petition contained the prayer for relief.

The first four claims and the sixth claim essentially alleged (1) violation of the government's obligation, pursuant to an 1848 treaty with Mexico and an 1850 treaty with the plaintiff, to protect the plaintiff's property rights; (2) invalidity of an 1868 treaty with the tribe on the grounds of fraud and duress, unconscionable consideration, and unilateral mistake; and (3) failure to provide educational and other services pursuant to the 1868 treaty. The fifth claim alleged that the government, by exploiting and allowing others to exploit the natural resources of the tribe without adequate consideration, violated its fiduciary duty under the 1868 treaty. The seventh claim, a general accounting claim, has been consolidated with the accounting claims in Docket Nos. 299 and 353, and is not before us here. The eighth claim alleged violation of a promise by officers of the United States to return certain lands "to the

[1] This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets. The dismissal of the claims in this case because the plaintiff voluntarily withdrew them would not support the contention that the dismissal is *res judicata* of the merits of those claims.

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East" in return for the Navajos' service in the Apache wars.

In August 1951, the plaintiff's claims attorney decided to divide into four separate dockets the eight claims of the original petition. The plaintiff filed a new petition in each of three new dockets, and allowed the petition in this docket (No. 69) to stand, without modification, as the general pleading. The tribe presented a taking claim, based upon facts originally set forth in Docket No. 69, in the petition in Docket No. 229. A claim for mismanagement of resources was presented in Docket No. 353 for oil and gas resources, and in Docket No. 299 for other resources. Thus, many of the claims originally presented in the original docket (No. 69) overlapped with the claims asserted in the subsequent dockets.

Separation of the plaintiff's claims into four dockets did not simplify or abbreviate the litigation of this case. Although almost three decades have passed since the filing of the original petition, the government has yet to file an answer. Instead, in the words of Trial Judge Bernhardt, there has been a "protracted seige of motions." In response to a government request for greater specificity and a Commission order to file an amended petition in Docket No. 69 no later than September 30, 1969, plaintiff filed a First Amended Petition on October 1, 1969. The entire amended petition read as follows:

> The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25, and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.

The government, on July 18, 1974, sought entry of final judgment in its favor on those claims. The Commission, on January 23, 1975, granted a motion by the plaintiff to amend its petition in Docket No. 69 by "reformulating" the first six claims. *Navajo Tribe* v. *United States*, 35 Ind. Cl. Comm. 305, 315 (1975). The Commission denied a motion for certification of that ruling to this court. *Navajo Tribe* v. *United States*, 36 Ind. Cl. Comm. 215 (1975).

On June 3, 1976, the government filed a motion to dismiss or for a more definite statement. The Commission transferred the case in Docket No. 69 to this court without ruling on the motion. On January 23, 1978, Trial Judge Bernhardt ruled on the motion, and on May 2, 1978, he issued an order on the tribe's motion for reconsideration of his January 23 ruling. With respect to the Commission's reinstatement of the dismissed claims after the limitations period had run, the trial judge denied the government's motion to dismiss the reinstated claims on the ground that those claims related back to the original petition.

II.

The applicable statute of limitations in the Indian Claims Commission Act, 25 U.S.C. § 70k, is a jurisdictional limitation upon the authority of the Commission to consider claims. *United States* v. *Lower Sioux Indian Community*, 207 Ct. Cl. 492, 501, 519 F.2d 1378, 1382 (1975); *Snoqualmie Tribe* v. *United States*, 178 Ct. Cl. 570, 586, 372 F.2d 951, 960 (1967). The provision, which defines the extent of the government's waiver of sovereign immunity, bars any claim not "presented" to the Commission on or before August 13, 1951. In this case, the original petition in Docket No. 69 was timely filed in July 1950, but the claims in question were withdrawn in 1969. The second amended petition, in effect reasserting the withdrawn claims, was not filed until 1975.

The Commission allowed the plaintiff to reinstate the withdrawn claims in 1975 on the ground that the "reformulated" claims were based upon and related back to the general recitations of fact in the original petition which were not withdrawn. 35 Ind. Cl. Comm. at 307. Although the 1969 amended petition "deleted" only the specific paragraphs which stated the claims in some detail, and not the general factual allegations preceding those paragraphs upon which the claims were based, the deleted paragraphs were the actual statements of the claims. Indeed, the plaintiff recognized in its 1969 amendment that by deleting

those paragraphs it was "*thereby withdrawing from consideration* herein the first, second, third, fourth, fifth, sixth, and eighth *claims*" (emphasis added).

The decision whether to dismiss all or part of a case lies with the plaintiff (subject to any necessary authorizations by the tribunal). In this case, for reasons not fully explained in the record, the tribe's claims counsel chose to withdraw the claims in question. Perhaps the attorney was unable to comply with the Commission's order for greater specificity, or sought to make the case more manageable by simplifying the claims and eliminating or reducing duplication.

Whatever his reasons, whether wise or ill-founded, the decision to withdraw these particular claims was a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney.

The plaintiff contends, however, that its attorney had no authority to withdraw those claims. It relies upon paragraph 6 of the contract between it and the attorney, which provided:

> 6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY [OF THE INTERIOR].[2]

The Commission presumed that the word "adjustment" covered the withdrawal of the claims, and noted that the record did not indicate whether the tribe had approved the withdrawal. 35 Ind. Cl. Comm. at 307, n. 2.

We construe this provision as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, i.e., the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived

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[2] Although the contract refers to Docket No. 89 before the Commission, we assume that was a typographical error, and the reference should have been to Docket No. 69. There is no Docket No. 89 in this case.

to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract "to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract." Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action.

Trial Judge Bernhardt upheld the Commission's reinstatement of the withdrawn claims on the ground that the second amended petition met the liberal notice requirement applied in determining whether an amended petition filed with the Commission after the limitations period related back to the original timely petition. The trial judge relied on *United States* v. *Lower Sioux Indian Community in Minn.*, 207 Ct. Cl. 492, 519 F.2d 1378 (1975), *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 393 F.2d 786 (1968), and *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 372 F.2d 951 (1967). Those decisions dealt with the question whether allegations in a timely petition were sufficient to cover the claims asserted in an otherwise untimely amendment. In the *Snoqualmie* case, we held that the requirement of the statute of limitations, that claims be "presented" within the limitations period, "should be read liberally to permit an amended pleading to relate back where there is sufficient notice." 178 Ct. Cl. at 588, 372 F.2d at 961.

That principle, however, has no application in a case in which the plaintiff has withdrawn its original claims and then seeks to reinstate them after the limitations period has run. The question here is not, as in those cases, the construction of the original petition; the issue before us is the effect of the plaintiff's voluntary dismissal of its claims in 1969.

III.

The first amended petition was in effect, if not in form, a voluntary dismissal of the plaintiff's nonaccounting claims

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in Docket No. 69. The amendment was filed pursuant to an order of the Commission, and no further authorization or action of the Commission was required. The Supreme Court stated the applicable rule in *Willard* v. *Wood:* "[W]here *from any cause* a plaintiff becomes nonsuit or the action abates or is *dismissed*, and, during the pendency of the action the limitation runs, the remedy is barred." 164 U.S. 502, 523 (1896) (emphasis added). In this case, the claims were dismissed because the plaintiff chose to do so. Following the dismissal, the situation stood as if the withdrawn claims had never been filed. *A. B. Dick Co.* v. *Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878, *rehearing denied*, 344 U.S. 905 (1952); *Maryland Cas. Co.* v. *Luther*, 41 F.2d 312 (5th Cir. 1930). For purposes of the statute of limitations, the claims contained in the second amended petition were "presented" for the first time in 1975, and the Commission lacked jurisdiction to hear them.[3]

IV.

Before concluding this opinion, we advert to a problem that exists in this case and probably in a number of other cases that the Indian Claims Commission recently has transferred to this court. That is the subject of delay. All of these cases were pending before the Commission for more than a quarter of a century, and some of them still are a long way from completion. The cases of which this docket is one part involve a wide variety of claims by the Navajo Tribe. The government has not yet filed its answer in some or all of the dockets. Unless drastic and effective steps are taken to expedite the proceedings in these Indian Claims Commission cases, they threaten to drag on indefinitely.

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[3] The plaintiff challenges characterization of the issue as jurisdictional. It argues that, since it withdrew only the prayers for relief and not the claims themselves, those claims were "subsumed" under the comprehensive prayer for relief of paragraph 30 and under claim 7's incorporation of preceding factual allegations. As noted above, however, the withdrawn paragraphs were not merely prayers for relief, and claim 7 incorporated only general recitations of fact. Moreover, the Commission recognized that the claims in question were withdrawn, not subsumed in the surviving claim. *Navajo Tribe* v. *United States*, 31 Ind. Cl. Comm. 40, 41 (1973).

The trial judges have an obligation to expedite these cases, and to take all necessary steps to insure their speedy determination. Many of the cases are complicated and difficult. There is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years. We have faith in the ability of the trial judges to develop such techniques. We expect the cases to be completed within a reasonable time.

More specifically, we direct the trial judge in the Navajo cases to file within 90 days, and after consultation with counsel, a timetable setting forth firm time limits for the proceedings in Docket Nos. 229, 299, and 353. These time limits should cover the filing of any further pleadings and amendments thereto, the filing of all dispositive or procedural motions, the completion of pretrial proceedings, and the trial of the cases. We expect the other trial judges to adopt similar timetables in cases transferred from the Commission.

CONCLUSION

Claims 1 through 6 and claim 8 in Docket No. 69 are dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and SMITH, *Judge*.

Order

The plaintiff has filed a motion for clarification of our opinion of June 13, 1979, in which we dismissed claims 1 through 6 and claim 8. In so doing, we stated that "This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets." (Footnote 1). Plaintiff now asserts that in this footnote we contemplated the possibility that the dismissed claims still might be asserted as part of claim 7 in docket No. 69, a general accounting claim that has been consolidated with the accounting claims in docket Nos. 299 and 253, and which therefore was not before us.

Plaintiff is mistaken. Footnote 1 was intended to make clear that despite the dismissal of claims 1 through 6 and claim 8, those claims could be asserted in the other pending dockets (Nos. 229, 299 and 353) if in fact they "are present in those dockets." The determination whether the dismissed claims are so present is a matter for the trial judge. Obviously, we would not have dismissed claims 1 through 6 and claim 8 in docket No. 69 if we had contemplated that all of those claims could be fully pressed under claim 7 in that docket. To the contrary, we held that plaintiff's previous

withdrawal of claims 1 through 6 and claim 8 in docket No. 69 precluded plaintiff from subsequently reasserting those claims because at the time of reassertion the statute of limitations had run on them. The plaintiff may pursue these dismissed claims only if and to the extent they are also part of the claims asserted in the dockets other than docket No. 69.

By The Court

/s/ Daniel M. Friedman
Daniel M. Friedman
Chief Judge

September 28, 1979

Filed: 7-11-50

APPENDIX C

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES OF AMERICA

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* This index is submitted for convenience only and is not a part of the petition. The titles in the index, which also appear in parentheses at the commencement of each claim, cannot by reason of their brevity wholly or adequately represent the subject matter and are not to be construed as a part of the allegations for any purposes.

BEFORE THE INDIAN CLAIMS COMMISSION

No.....

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES OF AMERICA

PETITION

To the Honorable Commissioners of the Indian Claims Commission:

Your petitioner, the Navajo Tribe of Indians, respectfully represents and alleges as follows:

First Claim

(Navajo lands; Treaty of September 24, 1850)

1.

Petitioner is a tribal organization recognized by the Secretary of the Interior as having authority to represent the Navajo tribe, and authorized by Section 10 of the Act of Congress approved August 13, 1946, Public Law 726, 79th Congress, 2d Session (60 Stat. 1049), an act to create and establish an Indian Claims Commission, to present claims to the said Commission for and on behalf of the petitioner and its members, who live upon and about their reservation in the States of New Mexico, Arizona, Utah and Colorado under the jurisdiction of the United States as exercised by and through the United States Department of the Interior.

2.

The claims herein set forth are presented pursuant to the aforesaid Indian Claims Commission Act; jurisdiction to hear and determine the said claims, and each of them, is conferred on the Commission by Section 2 of the said Act.

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8.

None of the claims herein set forth has been the subject of any action taken by Congress or by any department of the government or in any judicial proceeding; none is included, in whole or in part, in any suit pending in the Court of Claims or in the Supreme Court of the United States, and none has been filed in the Court of Claims under any legislation whatsoever.

4.

Pursuant to a contract executed July 17, 1947, and approved by the Commissioner of Indian Affairs on behalf of himself and the Secretary of the Interior on August 8, 1947, petitioner retained Norman M. Littell as general counsel and claims attorney, together with associate attorneys S. King Funkhouser and, by amendment duly executed and approved, Rufus G. King, Jr. The claims herein set forth are accordingly presented by petitioner's attorneys, Norman M. Littell, S. King Funkhouser and Rufus G. King, Jr.

5.

For centuries prior to the year 1864 petitioner and the various tribes and bands amalgamated with it during this period had occupied a section of the North American continent, now part of the southwestern United States, which was approximately bounded southward and eastward by four mountains, traditionally sacred to the Navajos and presently known as Mount Taylor in New Mexico, the San Francisco Peaks in Arizona, the La Plata Mountains in Colorado, and Mount Baldy in Colorado, and to the north and west by the Dolores and Colorado rivers. Most of this area, comprising approximately 45,000 square miles, was rich and fertile, a homeland where petitioner enjoyed all the rights of a free and sovereign people, governing itself, enjoying the fruits of industry and husbandry at a comparatively high level of aboriginal civilization, and armed in the fashion of the times to defend itself and repel aggressors.

15a

6.

Attempts were made to subjugate petitioner by representatives of the Spanish Crown in the seventeenth and eighteenth centuries, and by representatives of the Mexican Government after 1823, but petitioner's right, title, and interest in and to petitioner's lands were fully protected and preserved pursuant to Spanish and Mexican law. In 1846 the government of Mexico renounced its sovereignty over this area in favor of the respondent, and thereafter respondent's agents and citizens invaded petitioner's homeland in ever-increasing numbers, until a state of open hostility gradually developed. Before mounting pressure, petitioner withdrew to the wilder areas now identified as the vicinity of Navajo Mountain, the Canyon de Chelly, and the headwaters of the San Juan River. Military expeditions were sent into these areas to attack petitioner; retaliatory raids against the invader were organized and vigorously carried out. After two centuries of generally peaceful contiguity with white men, during which petitioner's members had acquired sheep and had gradually shifted from pueblo life to a pastoral culture, the Navajo took to arms and emerged as an important center of resistance in the path of the white man, as represented by respondent's agents and citizens.

7.

Petitioner was at all times ready to make an honorable reconciliation in so far as its members were apprised of and understood the white man's ways. A treaty of peace was negotiated and concluded between petitioner and respondent's agents in November, 1846, but was not ratified by respondent's Senate, or thereafter respected by respondent. A second treaty was negotiated and concluded between petitioner and respondent's agents on September 9, 1849, which said second treaty was ratified by respondent's Senate on September 9, 1850, and proclaimed by President Millard Fillmore on September 24, 1850 (9 Stat. 974). A true copy of said Treaty of 1850 is attached hereto and made a part hereof as "Appendix A." Article I thereof provides that petitioner shall be under the jurisdiction and protection of the United States pursuant to

the terms of the Treaty of Guadalupe Hidalgo. Article II of said Treaty of 1850 pledges "perpetual peace and friendship." Article III provides that the laws of the territory of New Mexico shall be applied and enforced in petitioner's country, and that the same shall be annexed to and made a part of the said territory, and Article VI provides that any person murdering or robbing petitioner's members shall be made answerable under laws of the United States. Article VIII provides that respondent shall establish military and trading posts in petitioner's country. Article IX provides:

> "Relying confidently upon the justice and the liberality of the aforesaid government (respondent), and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."

8.

Petitioner was assured by a protocol between the Mexican and the American governments and by the terms of the Treaty of Guadalupe Hidalgo, proclaimed by President Polk on July 4, 1848, that titles to all kinds of property, personal and real, existing in the ceded territories, were those which were legitimate titles under Mexican law, and that petitioner would be protected in the free enjoyment of its liberty and property by the respondent. Under Spanish law, prior to the attainment of Mexican independence in 1824, the rights of Indians to the possession and the full amount of lands belonging to them was fully protected, and those who sought to seize Indian lands or despoil Indian property were severely punished. After Mexico became independent of Spain in 1824, the rights of Indians were confirmed, enlarged, and strengthened and they were given equality of rights with other citizens and their ownership of property was fully protected. By the aforesaid Treaty of Guadalupe Hidalgo, the respondent agreed to protect and maintain the petitioner and its members in the full enjoy-

ment of their liberty and property. By the aforesaid Treaty of 1850, respondent assumed exclusive jurisdiction and protection of the petitioner and petitioner's property rights, but respondent made no effort to abide by, carry out, or enforce the aforesaid Treaty of 1850. On the contrary, petitioner was induced to negotiate and conclude two subsequent treaties with respondent's agents, one in 1855 and one in 1857, neither of which was ratified by respondent's Senate, or thereafter respected by respondent. The inconsistency, unreliability, and faithlessness of respondent's agents, and the series of negotiations conducted by them in this period, caused the Navajo rightfully to discredit and mistrust treaty terms.

9.

Respondent negligently and willfully departed from the standards of fair and honorable dealings in its relations with petitioner during the entire period from 1846 to 1868, in all said relations and, without limitation, in confusing and deceiving petitioner by negotiating various and inconsistent agreements and treaties and by permitting divers persons to harass petitioner and drive petitioner from rich and valuable portions of its homelands, as more particularly described in paragraph 5 above. Respondent failed, neglected, and refused to abide by, and committed numerous breaches and violations of, the terms of the aforesaid Treaty of 1850, although said treaty had been duly ratified by the Senate and proclaimed by the President of the United States.

10.

WHEREFORE, as its first claim, petitioner alleges:

(a) Respondent failed to accord to petitioner the right, title, interest, benefits, and enjoyment of property conferred on Indians by Spanish and Mexican law, pursuant to the Treaty of Guadalupe Hidalgo, as provided by the aforesaid Treaty of 1850.

(b) Respondent failed to apply or enforce the laws of the territory of New Mexico in petitioner's country, failed to annex petitioner's country to the territory of New Mexico,

and failed to apply and enforce the laws of the United States therein, and, on the contrary, respondent maintained military law until 1873 and intermittently thereafter, thereby subjecting petitioner's members to great suffering and hardship and depriving them of the fruits and benefits to which they would otherwise have been entitled as citizens of the territory of New Mexico, both prior to and after the accession of that territory to statehood in 1912.

(c) Respondent failed to protect petitioner's members against being murdered and robbed, as specifically undertaken in Article VI of the aforesaid Treaty of 1850, and, on the contrary, respondent's agents tolerated, acquiesced in, and sometimes led raids and expeditions into petitioner's country for the purpose of murdering and robbing petitioner's members, said raids and expeditions being conducted both by respondent's armed forces and by unauthorized bands of territorial troops, adventurers, Mexicans, and hostile Indians.

(d) Respondent failed to establish or maintain military or trading posts in petitioner's country, as specifically undertaken in Article VIII of the aforesaid Treaty of 1850, thereby depriving petitioner of the protection, order, and civilizing contacts which would have been afforded thereby, and aggravating the grievous situation and events hereinafter set forth.

(e) Respondent failed to designate, settle, and adjust petitioner's territorial boundaries, as specifically undertaken in Article IX of the aforesaid Treaty of 1850, in violation of the terms of said treaty and of the Treaty of Guadalupe Hidalgo, and thereby caused petitioner to be driven from and deprived of its homelands to the great loss and damage of the petitioner in that petitioner thereby lost approximately 20,000 square miles of rich land which was rightfully the property of petitioner, and petitioner's people were therefore confined to barren and unproductive lands where they have ever since eked out a bare existence, all as more particularly set forth hereinafter.

Second Claim

(Navajo lands; Treaty of August 12, 1868: Alternative Claims)

11.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, and further respectfully represents and alleges as follows:

In addition to those duties which respondent owed to the petitioner and its members pursuant to treaty obligations, respondent owed the duties of a guardian towards its wards, but as a result of respondent's failures, neglect, and breaches of its said duties toward petitioner and its members, arson, murder, and pillage continued to be perpetrated against them, and in retaliation by them, until, in 1863, full-scale warfare was initiated by respondent's agents. In the spring of 1864, after their crops had been ravaged and their dwellings fired, petitioner's members were overwhelmed by armed forces of the respondent. Many Navajos were killed, and the balance were compelled to surrender. Thereafter, together with their women and children and aged and infirm, they were mercilessly herded and driven on foot in a southeasterly direction a distance of 300 miles from their homeland to Fort Sumner, New Mexico, where those who had survived this full-scale war and the "Long March" were imprisoned under military guard.

12.

For a period of four years thereafter petitioner's members were held by armed forces of the respondent in a state of imprisonment and involuntary servitude at Fort Sumner, crowded into a small area, inadequately clothed, badly housed and fed, ravaged by disease, and reduced by close confinement and complete disruption of all their normal and historic ways of living to a destitute and desperate condition.

13.

Such was the condition of the imprisoned remnants of the petitioner's people in the spring of 1868 when a treaty was submitted by the respondent to the head men of the Navajos.

On June 1 the treaty was signed. None of the signers on behalf of the petitioner was literate. No legal counsel was appointed to advise the petitioner's head men, and no legal or other disinterested advice was available to them. Only the advice and assistance of the respondent's agents and employees and the interpretation of language by respondent's interpreters were available to petitioner. All of the signatures affixed by and on behalf of petitioner were by mark only. Thus the Treaty of 1868 was signed.

14.

The said treaty was submitted to and ratified by the Senate of the United States on July 25, 1868 (15 Stat. 667), and proclaimed by President Johnson on August 12, 1868. Annexed hereto and made a part hereof as "Appendix B" is a true copy of said Treaty of 1868.

15.

Article II of the aforesaid Treaty of August 12, 1868 (Appendix B), defined and limited the boundaries of the Navajo reservation as follows:

> "The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; . . ."

The said territory thus defined in the Treaty of 1868 was a meager and barren portion of petitioner's homeland and of the rich and fertile area upon which petitioner and its members had theretofore subsisted.

From time to time, through divers laws and executive orders, additional areas of land were transferred from the public domain to the Navajos as additions to the aforesaid reservation described in the Treaty of 1868, but such additions were frequently reduced, rescinded, or cancelled under pressure from non-Indian settlers who desired said lands for themselves. At no time has petitioner renounced its right, title, and interest in and to the lands described in paragraph 5 above, and at no time have the additions or attempted additions to the said reservation by the respondent been sufficient in area to restore to the petitioner the aforesaid original homelands.

16.

WHEREFORE, as its second claim, petitioner alleges in the alternative as follows:

First Alternative

(a) That the said Treaty of 1868 and each and every provision thereof is invalid and void on the grounds of fraud, duress, unconscionable consideration and unilateral mistake; that the lands described in paragraph 5 above were wrongfully seized and taken from petitioner by said fraud and duress.

(b) Respondent at all times material herein failed and refused to restore to the petitioner the aforesaid lands wrongfully seized by others by and with the consent and wrongful approval of the respondent, thereby depriving petitioner of approximately 20,000 square miles of land as described in paragraph 5 above, and respondent at all times material herein failed and refused to pay just compensation to the petitioner for the said lands, and in consequence there is due and owing to petitioner a sum which can only be determined after this Commission first finds and determines the boundary lines and fair value of the area thus wrongfully taken.

Second Alternative

The said Treaty of 1868 between the petitioner and the respondent should be deemed to be revised in each and every

respect set forth hereinafter in the allegations of this and succeeding paragraphs of this petition on the grounds of fraud, duress and unconscionable consideration, mutual or mistake in law and in fact, and particularly said treaty should unilateral mistake in law and in fact, and particularly said treaty should be deemed to be revised to include as reservation lands all of that area designated in paragraph 5 above to which petitioner was rightfully entitled pursuant to the Treaty of Guadalupe Hidalgo, the aforesaid Treaty of 1850, and by right of aboriginal occupancy. In so far as the said treaty sought to bind petitioner to accept the aforesaid reservation boundaries as the limits of its tribal land, it was not accepted and approved by petitioner's head men as their free and voluntary acts but was accepted only under threat, duress, and in the presence of force. At all times since the execution of said treaty, the petitioner's members have been wrongfully excluded and barred from, and prevented from returning to, and have been uncompensated for the loss of, their true and rightful possession of the homeland of the Navajos.

Third Claim

(Damage to reservation lands; Treaty of August 12, 1868)

17.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9 and 11 through 15, and further respectfully represents and alleges as follows:

Petitioner's members were at all times material herein uneducated and uninformed in regard to the white man's ways and, until the summer of 1947, were without legal counsel to advise petitioner in respect to petitioner's legal rights. Petitioner and petitioner's members have at all times been diligent and faithful in complying with the terms of the Treaty of 1868 and in carrying out each and every obligation required of petitioner and petitioner's members without knowledge of the true legal status of the said treaty as hereinabove alleged.

Should the Commission find pursuant to the first alternative of the second claim (paragraph 16 above) that the said Treaty

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of 1868 is invalid on the grounds of duress, fraud, and mistake, as hereinabove alleged, then and in that event the ordinary standards of fair and honorable dealing between the petitioner and the respondent, and the duties and obligations of the respondent as guardian of petitioner and of petitioner's members, demanded that the respondent take all steps necessary in order to civilize, educate, and establish the petitioner's members in agricultural and other pursuits to the end that they should become self-supporting, independent citizens, and responsible members of peaceable communities, and petitioner alleges that the minimum of such obligations of the respondent, subject to qualifications and exceptions hereinafter stated, were indicated in the so-called Treaty of 1868, and that said treaty be considered as specifying in part the duties owing by the respondent to its wards. Standards of fair and honorable dealing, and the duties of respondent as guardian, required respondent to exercise the highest degree of care in all acts and services in carrying out its said obligations and especially in dealing with petitioner's property and funds. In the event of such finding by the Commission, holding invalid the said Treaty of 1868, then the allegations hereinafter stated in the following paragraphs of this petition, in so far as they refer to breaches and violations of the said Treaty of 1868 by the respondent, are submitted as setting forth the failures, breaches, and violations of said minimum of undertakings, promises, and commitments by the respondent, as departures from the standards of fair and honorable dealings in respondent's relations to the petitioner, and as failures of respondent in the performance of its duties as guardian for the petitioner and petitioner's members.

Should the Commission sustain the second alternative of the second claim and find that the said treaty is valid but that claims should be allowed which would result if said treaty were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or in fact, or on any other grounds cognizable in a court of equity, then and in that event the allegations hereinafter set

forth in this petition are submitted as setting forth such claims together with respondent's breaches and violations of the said treaty, as departures from standards of fair and honorable dealings in respondent's relations to petitioner, and as failures of respondent in the performance of its duties as guardian for the petitioner and petitioner's members.

18.

Petitioner and petitioner's members have at all times been diligent and faithful in trying to comply with the terms of said Treaty of 1868 to the best of their understanding and abilities, but respondent has failed and refused to carry out its obligations thereunder.

The said Treaty of 1868 (Appendix B) provides in part:

> "ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation . . .
>
> "ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars."

Instead of complying with the provisions of the treaty and endeavoring to assist and aid the petitioner and its members in settling upon agricultural land, the surviving members of petitioner's tribe were taken, again on foot, after the said treaty was executed, some to Fort Wingate near Gallup, New Mexico, and the rest to Fort Defiance, Arizona, where they were held under conditions of severe hardship through the winter of 1868-69 and through most of the year 1869. White men had in the period of petitioner's captivity entered upon and seized most of the rich lands theretofore owned and oc-

cupied by Navajos, except for the inadequate and relatively barren area designated as their reservation.

Thereafter petitioner's members were released upon this reservation. With the exception of a limited number of families, particularly along the San Juan River, settlement in farming pursuits was then, and at all times since has been, impossible, all of which was known to respondent at the time when said treaty was signed, but was not known to petitioner. Various seeds and basic agricultural implements in an amount and of a value unknown to your petitioner, were distributed indiscriminately among petitioner's members, but it was not possible for them to take full advantage of the terms of said treaty provision because the purported right of settlement on specific lands for agricultural pursuits constituted a deception and delusion inasmuch as the lands assigned within the aforesaid reservation, with the exception of a limited area, were then, and at all times since then have been, too arid and barren for farming purposes. Respondent failed and neglected to advise petitioner's members as to the import and operation of the provisions of Article VII of the said treaty, and although lands suitable for farming were available to respondent throughout petitioner's former homeland, and could and should have been supplied to petitioner, respondent at all times failed and refused to supply such lands, compelled petitioner's members to subsist on herding sheep as aforesaid, and encouraged the Navajos to build up their flocks to a point where each family would have at least a thousand head of sheep.

As a direct result of said policies and practices of the respondent, by the year 1937 the said reservation was overcrowded, eroded, and irreparably damaged by overgrazing, and petitioner had been led by the respondent down a blind avenue affording no possibility for the petitioner's people to become self-sufficient in a productive economy. Respondent's failure to supply agricultural land, as promised in the Treaty of 1868, to relieve the grazing areas, and respondent's encouragement of grazing as almost the exclusive economy of the Navajos thus brought the petitioner to a state of poverty and destitution

so that public charity has been necessary over a period of years to alleviate hardship and suffering.

19.

WHEREFORE, as a third claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent at all times failed to provide agricultural land for the heads of Navajo families, although said lands were at all times available to the respondent for distribution in accordance with the terms of the aforesaid treaty.

(b) The reservation lands to which petitioner was confined were damaged and injured by overgrazing to an irreparable extent in many areas, and in other areas in such a manner and to such an extent that only years of work and a very great expenditure of funds beyond the means of the petitioner could restore said lands and bring them back to their normal and proper grazing capacity, all to the petitioner's great loss and damage.

Fourth Claim

(Education; schools)

20.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, and 17 and 18, and further respectfully represents and alleges as follows:

Article I of the aforesaid Treaty of 1868 (Appendix B) provides in part, "From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it . . ." Article V provides that heads of Navajo families may settle on 160 acres of

selected lands, and single members of the tribe may settle on 80 acres of such lands. Article VI provides as follows:

> "In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.
>
> "The provisions of this article to continue for not less than ten years."

On its part, the petitioner relinquished the most fundamental right of a free people—the right to protect and defend itself—and in return it received respondent's pledge of peace, education, and assistance in adapting itself to the ways of the white men. In forcing petitioner's members to abandon their own way of life, respondent solemnly pledged its honor to teach them the ways of American civilization and to provide education so that they could espouse the only way of life left open to them, namely, active participation in the new society being built around them.

Various efforts have been made by respondent from time to time, and various sums of money have been authorized and expended, to fulfill its obligations in educating petitioner's members and preparing them to take a fitting place in the culture and society of respondent, but such efforts have been patently insufficient, ineffectual, and piecemeal, and at no time have they been realistically related to the size of the Navajo population. Respondent's expenditures have been inadequate, wasteful, ill-advised, and poorly administered, and have not fulfilled the pledges made by respondent in the said Treaty of 1868. Respondent at all times failed to supply the means

of civilizing the Navajos; at the outset, in lieu of the schoolhouse and teacher promised for every 30 children, only one schoolroom and the intermittent services of one teacher were provided for the entire tribe. Seventy-eight years thereafter, when the aforesaid Indian Claims Commission Act was enacted, petitioner's members, numbering approximately 61,000, were still living in an impoverished and exhausted land, in squalor and abject poverty, without training in health practices, citizenship, or ways of economic development, afflicted with the highest tuberculosis and infant mortality rates in the United States, as well as high incidence of diarrhea, dysentery, pneumonia, dental caries, trachoma, skin and venereal diseases. After years of neglect and disregard of its treaty obligations by respondent, petitioner's members constitute a submerged, isolated, and broken people, of whom approximately 88 per cent are illiterate and unable to speak the English language, 66 per cent have no schooling whatever, while the median number of school years for the tribe is less than one year, and no school facilities whatever exist for 16,000 out of 21,000 children of school age. Adequate schoolhouses have never been provided. Teachers have never been engaged in sufficient numbers. Respondent's agents and employees have made no consistent efforts to induce or enable petitioner's members to send their children to such inadequate schooling facilities as were, in fact, made available, and such facilities have from time to time been neglected, allowed to deteriorate and become unfit for use, and closed or abandoned. Moreover, respondent, in its superior experience and with the wide knowledge available to it, at all times knew that the facilities provided would be and have been ineffectual to achieve the end, viz., to give "the elementary branches of an English education," contemplated and intended by the parties--taking into account the wide dispersion of petitioner's community. Petitioner could not induce its children to attend the schools when there were no schools to attend, or when the schools were too few and too remote from where petitioner's members lived.

As a direct and proximate result of the said violations of treaty obligations and of respondent's bungling, neglect, and default, the great majority of petitioner's members live in a state of suffering and uncomprehending bewilderment, without self-reliance, set apart from, and powerless to participate on equal terms with, their fellow countrymen in the agricultural and industrial life of the nation to which they contributed so much in times of peace and in times of war.

21.

WHEREFORE, as a fourth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent has by said conduct failed and neglected to insure the civilization of petitioner and to maintain an honorable peace, in violation of the intent, spirit, and purpose of the said Treaty of 1868, and in disregard of the express pledges, promises, and affirmations made therein, and has thereby caused and brought about the downfall of the petitioner from independence, health, and self-sufficiency, to the grievous conditions and the abject circumstances related in paragraph 20 above.

(b) Respondent has continuously failed and neglected to serve and discharge the terms of the said Articles I, V, and VI of said Treaty of 1868, and each and every part thereof. Respondent has thus continuously defaulted, at all times material herein, in its obligation to provide school facilities and teachers, the same being a continuous obligation, from the date of the said Treaty of 1868 to the enactment of the aforementioned Indian Claims Commission Act, the said default constituting a breach of the Treaty of 1868 and operating to petitioner's great loss and damage.

Fifth Claim

(Natural resources and tribal property)

22.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, and 20, and further respectfully represents and alleges as follows:

Respondent has at all times since the captivity of petitioner exercised complete dominion and control over petitioner's tribal property, and has held and does now hold title to the reservation lands in a fiduciary capacity for the use and benefit of petitioner. Article II of the aforesaid Treaty of 1868 (Appendix B) provides that the reservation of the Navajos was originally "set apart for the use and occupation of the Navajo tribe of Indians," and also:

> ". . . that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

Notwithstanding the foregoing restrictions, respondent has tolerated and allowed many persons in and upon the reservation and areas subsequently added thereto for various unauthorized purposes in derogation of petitioner's exclusive right of occupancy and exclusive enjoyment of all natural resources and earnings and benefits therefrom. Such unauthorized persons have profited on resources of the reservation and have exploited petitioner's members, pre-empted land rightfully set apart for use and occupation of petitioner's members, and drawn many millions of dollars out of the weak economy of the tribe, without payment of adequate compensation therefor, all to petitioner's great prejudice and damage.

23.

WHEREFORE, as a fifth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms

thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects (enumerated without limitation):

(a) Respondent has tolerated and allowed certain persons to remove oil and gas from lands set apart for the use of petitioner and its members, and has sold such oil and gas to divers persons for an inadequate consideration at less than the true market value of said oil and gas, all to petitioner's great loss and damage.

(b) Respondent has mined coal for its own use, and tolerated and allowed certain persons to mine and remove coal from lands set apart for the use of petitioner and its members, and to buy such coal for an inadequate consideration, all to petitioner's great loss and damage.

(c) Respondent has removed timber for its own use, and tolerated and allowed certain persons to remove timber from lands set apart for the use of petitioner and its members, and to buy such timber for an inadequate consideration at less than the true market value thereof, all to petitioner's great loss and damage.

(d) Respondent has mined and removed vanadium ore for its own use and tolerated and allowed certain persons to mine and remove vanadium ore, containing valuable uranium and other minerals, from lands set apart for the use of petitioner and its members, and to buy such vanadium ore for an inadequate consideration at less than the market value thereof, all to petitioner's great loss and damage.

(e) Respondent has allowed and permitted certain persons to enter upon and transact business of various sorts on petitioner's reservation without payment of compensation to petitioner, and has permitted certain persons to graze livestock upon said lands, all to petitioner's great loss and damage.

(f) Respondent has granted and conveyed and allowed to be granted and conveyed divers rights of way on and over

petitioner's reservation lands without adequate compensation and without compliance with the terms of the Treaty of 1868, without payment of adequate compensation therefor, all to petitioner's great loss and damage.

Sixth Claim

(Miscellaneous facilities; Treaty of Aug. 12, 1868)

24.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, and 22, and further respectfully represents and alleges as follows:

By Article III of the said Treaty of 1868 (Appendix B) the respondent undertook and bound itself to cause to be built one warehouse, one carpenter shop, one blacksmith shop, one schoolhouse, and one chapel (besides a residence for one agent). The said Article III was a standard undertaking made by respondent in negotiations with various Indian tribes and groups subjugated and placed on reservations during this period. Facilities so limited might have been adequate to provide service for, and instruction to, tribes and groups of limited numbers and confined to small reservations, but said facilities were patently inadequate for petitioner's members who were widely dispersed over a large territory. Even such inadequate facilities were not properly furnished nor properly equipped for several years after the execution of the said treaty.

25.

WHEREFORE, as a sixth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Article III should have been revised on the grounds of mutual mistake in that the provisions thereof were wholly

inadequate to accomplish the purpose mutually intended and understood, and in that the provisions as set forth in said treaty constituted a deception and an illusion of consideration wholly misleading to petitioner. Said treaty should have provided for the construction of at least one warehouse, one carpenter shop, one blacksmith shop and one chapel for each 1,000 Navajos, namely, for not less than 10 of each such structures at various places over said reservation accessible to the said Navajos.

(b) Respondent failed and neglected to discharge the obligation imposed by the said Article III, revised or not revised, the same constituting a breach of the Treaty of 1868, all operating to petitioner's great loss and damage.

Seventh Claim

(Tribal funds; fiduciary relationship)

26.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, 22, and 24, and further respectfully represents and alleges as follows:

At all times since the respondent took jurisdiction over the petitioner and asserted sovereignty over petitioner's homeland from and after the Treaty of Guadalupe Hidalgo proclaimed in 1846, petitioner's property and funds have been in the care, custody, and jurisdiction of the respondent. Respondent has at all times owed to the petitioner that high degree of fiduciary duty and accountability commonly associated with the relationship of guardian and ward as hereinabove alleged, but respondent has never rendered to petitioner a true and complete accounting for all transactions carried out by the respondent, its officers, agents, and employees, in receiving and disbursing income and receipts from petitioner's property held in trust by the respondent and in expending tribal funds, and there were many instances of improper or wrongful use or expenditure of such funds by the respondent for other than tribal purposes.

27.

WHEREFORE, as a seventh claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent has through its agents and officers so managed petitioner's tribal funds and assets that the said tribal funds and assets have been wasted and dissipated, all to petitioner's great loss and damage.

(b) The President of the United States has from time to time designated lands, and the Congress of the United States has from time to time appropriated funds, for the use and benefit of petitioner's members. Various goods, revenues, earnings, and payments have come into the possession of respondent's agents and employees as trustees for petitioner's members. Respondent has failed and neglected to account adequately or correctly to petitioner for such receipts, allocations, disbursals, and disposal of such aforesaid lands, funds, goods, revenues, earnings, and payments, the same being in the possession and control of respondent.

(c) No general accounting has ever been submitted to petitioner by the respondent setting forth all of the transactions and items for which tribal funds, or receipts and disbursements for tribal lands and properties, have been expended by respondent. Various instances of misappropriations and mismanagement on the part of respondent's agents and employees, and by other persons acting with the knowledge of and in collusion with the said agents and employees, have occurred from time to time in amounts presently unknown and which can only be revealed by a general accounting, all to the great damage and loss of the petitioner.

Eighth Claim

(Agreement for service in Apache wars)

28.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, 22, 24, and 26, and further respectfully represents and alleges as follows:

During the year 1886 the respondent, being engaged in war against the Apache Tribe of Indians, solicited members of petitioner's tribe to serve as scouts, reserves, and in other supporting capacities with its armed forces. Petitioner's chiefs and head men agreed with respondent's military officers to provide guides and scouts to serve as aforesaid upon condition that respondent return to petitioner its homelands "to the East," which phrase meant, and was understood by all parties to mean, the lands described in paragraph 5 above. Respondent's officers, purporting to act for and bind respondent, accepted this condition, and petitioner's members risked their lives and rendered extensive and valued services to respondent in said wars in reliance on said promises.

29.

WHEREFORE, as its eighth claim petitioner alleges that respondent has refused and failed to return petitioner's homelands, or to compensate petitioner for their value, thereby violating the said promise and agreement of 1886 which petitioner's members had faithfully and diligently acted upon.

30.

The foregoing averments and claims summarize a long record of wrongful acts and omissions on the part of respondent, hitherto unredressed.

WHEREFORE, your petitioner requests a full accounting from the United States of America, and prays judgment in favor of the Navajo Tribe of Indians against the United States of America in an amount to be determined by the fair value of the lands wrongfully taken from petitioner, plus fair and

honorable rectification of, and compensation for, the various breaches, defections, wrongs, departures from standards of fair and honorable dealings, and violations of the duties of respondent as guardian, all as enumerated and described herein, less counterclaims and offsets, if any, together with interest from the respective dates due, at rates to be determined by law, and for the costs of this action, together with such other, further, and general relief as to the Commission may seem just and warranted.

NORMAN M. LITTELL,
S. KING FUNKHOUSER,
RUFUS G. KING, JR.,
Attorneys for Plaintiff,
1422 F Street, N. W.,
Washington 4, D. C.

APPENDIX A

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS

(Ratified by the Senate September 9, 1850;
Proclaimed by the President September 24, 1850)

The following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fe, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracing parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by

other persons or powers in amity with the said States, shall be referred to the government of said States for adjustment and settlement.

III. The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

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VI. Should any citizen of the United States or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places,

to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. WASHINGTON, [L.S.]
Brevet Lieutenant-Colonel Commanding

JAMES S. CALHOUN, [L.S.]
Indian Agent, residing at Santa Fe.

MARIANO MARTINEZ, his x mark, [L.S.]
Head Chief.

CHAPITONE, his x mark, [L.S.]
Second Chief.

J. L. COLLINS.
JAMES CONKLIN.
LORENZO FORCE.

ANTONIO SANDOVAL, his x mark.
FRANCISCO JOSTO, his x mark.
Governor of Jemez.

Witnesses—

H. L. KENDRICK, *Brevet Major, U.S.A.*
J. N. WARD, *Brevet 1st Lieut. 3d Inf'ry.*
JOHN PECK, *Brevet Major U.S.A.*
J. F. HAMMOND, *Assistant Surg'n U.S.A.*
H. L. DODGE, *Capt. comd'g Eut. Rg's.*
RICHARD H. KERN.
J. H. NONES, *Second Lieut. 2d Artillery.*
CYRUS CHOICE.
JOHN H. DICKERSON, *Second Lieut. 1st Art.*
W. E. LOVE.
JOHN G. JONES.
J. H. SIMPSON, *First Lieut. Corps Top. Engrs.*

APPENDIX B

Treaty With the Navajo Indians.
June 1, 1868.

(Ratified July 25, 1868; Proclaimed August 12, 1868) Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:—

Article I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under

this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children

can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English eduction shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named,

on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes. but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may

range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood

or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article ..... of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will

not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, *Chief.*	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GANADO MUCHO.	his x mark.

COUNCIL.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO:	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.

B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.

THEO. H. DODD,
U. S. Indian A't for Navajos.

CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.

J. C. SUTHERLAND,
Interpreter.

WILLIAM VAUX,
Chaplain, U. S. A.

APPENDIX D

Special Claims Contract

THIS AGREEMENT, made the 1st day of July, 1968, at Window Rock, Arizona between Raymond Nakai, Chairman of the Navajo Tribal Council, acting on behalf of the Navajo Tribe of Indians (hereinafter designated as the TRIBE), under authority vested in him by Resolution CAP-56-68 of the Navajo Tribal Council adopted on April 24, 1968, attached to and made a part hereof, and Harold E. Mott, Attorney at Law, of Albuquerque, New Mexico, and Window Rock, Arizona (hereinafter designated as the ATTORNEY),

Witnesseth

1. *Employment.* The TRIBE has certain claims pending before the Indian Claims Commission, identified as Docket Numbers 229 (presently consolidated with Docket Nos. 196, 227, 266, 91, 30, 48, 22-D and 22-J), 299, 353 and 89 (hereinafter referred to as "the claims"), which were filed by an attorney formerly retained by the TRIBE as claims counsel who did not complete the work of their presentation and disposition. The TRIBE, desirous that said claims be diligently prosecuted to judgment or other appropriate conclusion, hereby retains and employs the ATTORNEY for a period of four (4) years, commencing on July 1, 1968, to advise and represent the TRIBE in connection with such claims, pursuant to the provisions of Section 2103 of the Revised Statutes (Section 81, Title 25, United States Code), as amended.

2. *Duties of the ATTORNEY.* It shall be the duty of the ATTORNEY to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract. He shall employ such other persons as may be required to carry out his obligations hereunder, *provided* that the cost of secretarial services and the salary

of an attorney, hired with the approval of the TRIBE to assist with the prosecution of the claims shall be deemed an expense incurred under Paragraph 4(A) of this contract.

3. *Compensation.* In consideration for the successful prosecution and conclusion of the claims, the ATTORNEY shall receive ten percent (10%) of any and all sums recovered for the benefit of the TRIBE. It is understood that said compensation shall be wholly contingent upon a recovery for the benefit of the TRIBE and shall be shared by the ATTORNEY and other attorneys, if any, determined to be entitled to a part thereof.

4. *Expenses.*

A. The ATTORNEY shall be entitled to reimbursement of the following expenses, the total of which shall be reimbursed to the TRIBE from any portion of a tribal recovery allocated to attorney fees: the cost of hiring an attorney, with the approval of the TRIBE, who shall devote such time as shall be necessary to secure the expeditious prosecution and conclusion of the claims within the period contemplated hereunder, to be compensated at the rate of twenty-five dollars ($25.00) per hour if he shall expend less than six hundred (600) hours per year, and fifteen thousand dollars ($15,000) per annum if he shall work six hundred (600) or more hours per year; cost of local secretarial service up to six thousand dollars ($6,000) a year, it being understood that any amounts paid for such service in excess of this amount including salary or bonuses shall be paid in their entirety by ATTORNEY; three-fourths (3/4) cost of office not to exceed three thousand dollars ($3,000) expense to TRIBE a year; and three-fourths (3/4) of all miscellaneous expenses included in daily office maintenance including, but not limited to supplies, postage, local telephone, stamps and like expenses, the cost to the TRIBE not to exceed five thousand dollars ($5,000) a year. Included in this figure shall be furniture not furnished by ATTORNEY. Such additional

furniture and equipment shall be furnished by TRIBE and the ownership thereof shall be in and remain in the TRIBE and become its exclusive property.

B. The ATTORNEY shall also be reimbursed for all necessary and proper expenses incurred in connection with the performance of his duties hereunder, including, but not limited to travel expenses (including mileage at the rate of ten cents (10¢) per mile when privately-owned automobile is used), long distance telephone and telegraph tolls; taxi fares, notary fees, costs of printing, reproducing and purchasing documents, and cost of stenographic services incurred while in travel status, *provided* that the ATTORNEY shall not be deemed to be in travel status when in or traveling between the claims office and Window Rock, Arizona. Said expenses shall not be reimbursed to the TRIBE by the ATTORNEY and shall not exceed the sum of twelve thousand dollars ($12,000) per year, except for such additional amounts as may be authorized by the TRIBE and approved by the Secretary of the Interior or his authorized representative (hereinafter designated as the SECRETARY).

C. The expenses enumerated herein with the exception of the salary of the secretary shall be reimbursed to the ATTORNEY only upon presentation of itemized and verified statements approved by the SECRETARY or his designee and the TRIBE, and accompanied by proper vouchers evidencing the actual expenditure thereof, except for expenditures where no vouchers are issued, such as tips, taxi cab fares, meals and like expenditures. The salary of the secretary shall be paid out of the fund estabiished for claims expenses on IBM payroll cards.

D. Payment of expenses and compensation under this contract shall be contingent upon the availability of tribal funds or appropriation by the Congress of the United States of tribal funds held to the credit of the TRIBE.

5. *Reports.* Within twelve (12) months of the date of this contract, the ATTORNEY shall furnish a written report to the TRIBE and SECRETARY upon the status of the claims, setting forth the amount and nature of each claim, the issues of fact and law involved, an assessment of the work completed and remaining to be done, an estimate of the time that will be required to secure final judgment or other appropriate disposition, and a program for its prosecution. Such report shall be supplemented each six (6) months throughout the term of this contract.

6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY.

7. *Assignments.* No assignment of the obligations of this contract, in whole or in part, and no assignment or encumbrance of any interest in the compensation to be paid herein shall be made without the consent, previously obtained, of the TRIBE and the SECRETARY; any such assignment or encumbrance in violation of the provisions of this paragraph, shall operate to terminate this contract. In the event of such termination, no person having any interest in this contract or in the compensation provided hereunder shall be entitled to any compensation whatsoever for services rendered subsequent to the date of termination.

8. *Termination.* This contract may be terminated at any time by either party upon ninety (90) days' written notice to the other party and the SECRETARY. This contract may also be terminated for cause by the SECRETARY after a hearing on reasonable notice. If the SECRETARY finds that the interests of the TRIBE so require, he may suspend this contract and the payment of all amounts due the ATTORNEY hereunder, pending a hearing which shall be held without unreasonable delay.

/s/ RAYMOND MAKAI
Raymond Makai
Chairman of the Navajo Tribal Council

/s/ HAROLD E. MOTT
Harold E. Mott

Approved this 21st day of November 1968 pursuant to letter dated November 15, 1968, signed by Assistant Secretary Anderson.

/s/ GRAHAM HOLMES
Graham Holmes
Area Director

29-680 O—84—7

August 22, 1968

Memorandum to Contract Files for Navajo Cases in Dockets Numbered: 69, 229, 299, 353

From: Donald Hyde

Mr. Harold E. Mott, General Counsel for the Navajo Tribe of Indians, was elected Claims Attorney for the Navajo Tribe by the Navajo Tribal Council on April 25, 1968 and a contract of employment between Mr. Mott as such claims attorney and the Navajo Tribe was executed by the parties on June 6, 1968. This contract of employment, however, was disapproved by the Department of the Interior. An Assistant Secretary of the Interior advised Mr. Mott and the Tribe, by letter, of certain amendments that Mr. Mott and the Tribe could make that would make the contract acceptable to the Department, so Mr. Lovell of the Bureau of Indian Affairs advised the Commission today (by telephone). Mr. Lovell thought it might be a matter of a few weeks before the contract will be eventually approved (after appropriate amendments are made in it).

APPENDIX E

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Defendant*

First Amended Petition

To The Honorable Commissioners
Of The Indian Claims Commission:

The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims.

Respectfully submitted,

/s/ HAROLD E. MOTT
Harold E. Mott
First National Bank Bldg.—East
Suite 304
5301 Central Avenue, N.E.
Albuquerque, New Mexico 87108

Claims Attorney,
Navajo Tribe of Indians
Attorney of Record

APPENDIX F

BEFORE THE INDIAN CLAIMS COMMISSION

Docket Nos. 69, 299 and 353

THE NAVAJO TRIBE, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

Decided: January 23, 1975

Appearances:

William C. Schaab, Attorney for the Plaintiff.

Dean K. Dunsmore, with whom was Assistant Attorney General,
Wallace H. Johnson, Attorneys for Defendant.

Opinion of the Commission

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission has before it plaintiff's motion of July 1, 1974, to amend the petitions in Dockets 69, 299 and 353, defendant's response thereto, and plaintiff's reply to the response. In addition, we have before us defendant's motion for final judgment, and plaintiff's response. Since these motions deal with related issues, they will be decided together.

Plaintiff originally asserted eight claims for relief in its petition in Docket 69, which was filed on July 11, 1950. Each claim contained allegations of certain facts and wrongdoings, and each was followed by a paragraph stating plaintiff's legal conclusions arising from the preceding allegations. Claims 1 through 6 and claim 8 pertain to various treaties and agreements between the parties which were

concluded in the nineteenth century. Claim 7 is a request for a general accounting.[1]

In an amended petition, filed October 1, 1969, plaintiff deleted certain of the conclusory paragraphs of its original petition, and stated that it was thereby withdrawing from consideration claims 1 through 6 and claim 8. However, it did not delete any of the allegations of fact supporting the claims.

Plaintiff's motion to amend which is now before us was filed following a change of counsel for plaintiff in September 1973. This motion proposes to reformulate the conclusory paragraphs of claims 1 through 6 of the original petition and it seeks permission to amend the seventh claim by adding thereto a prayer for supplementation of defendant's 1961 accounting report. Plaintiff also requests permission to amend the petitions in all three dockets by including a request that defendant's accounting report be extended beyond August 13, 1946, as to wrongs occurring before that date and continuing after it.

Plaintiff's Motion to Reformulate Claims 1 Through 6

Defendant contends that as a result of plaintiff's amended petition of 1969, the proposed reformulated claims have nothing to which they can relate back, and argues that as a consequence plaintiff's motion to amend must be denied. However, as we have observed above, plaintiff's first amended petition, which purported to withdraw seven of plaintiff's claims,[2] did not delete the allegations of fact

[1] Since Dockets 299 and 353 also present accounting claims, and defendant filed one accounting report for all three dockets, we consolidated the dockets. 31 Ind. Cl. Comm. 40 (1973). For a history of the dockets see our discussion therein.

[2] The attorney contract in effect with the Navajo Tribe at the time of the amended petition of 1969 required that any adjustment of plaintiff's claims by plaintiff's attorneys would be subject to

which were the substance of those claims. Moreover, plaintiff's seventh claim, which clearly remained after the amended petition of 1969 was filed, stated that plaintiff "restates and reaffirms each and every allegation of fact" of the original petition.

Therefore, since plaintiff's proposed reformulated claims are based on allegations of fact which have never been withdrawn, we will grant plaintiff's motion of July 1, 1974, to amend the petitions.

Defendant's Motion for Final Judgment

Defendant's motion for dismissal of claims 1 through 6 and claim 8 in Docket 69 is grounded on plaintiff's purported withdrawal of these claims by the filing of its amended petition in 1969.

The newly amended petition which we are permitting to be filed will supersede the 1969 amended petition which is the petition to which defendant's motion is directed. For this reason, as well as the reasons set forth above for granting plaintiff's instant motion to reformulate its claims, we will deny defendant's motion for final judgment as to the claims 1 through 6 and claim 8.

Plaintiff's Motion to Amend Seventh Claim

This motion requests permission to amend the seventh claim in Docket 69 by adding a prayer that further information be supplied in the accounting report. Defendant's response to plaintiff's motion does not address itself to this issue.

Plaintiff's motion is not in accord with the proper procedure in accounting cases. *See, e.g., Blackfeet and Gros*

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the approval of the tribe. The record does not indicate that this requirement, which would presumably be applicable to an amendment withdrawing several claims, was met.

Ventre Tribes v. *United States*, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65 (1973), and cases cited therein; *Sioux Tribe* v. *United States*, Docket 114 *et al.*, 12 Ind. Cl. Comm. 541 (1963). After defendant has filed its accounting report, amendments to plaintiff's petition are usually no longer necessary. *Ft. Peck Indians* v. *United States*, Docket 184, 34 Ind. Cl. Comm. 24, 55 (1974).

The appropriate procedure is for plaintiff to file amended or supplemental exceptions to defendant's accounting report or to move for a supplemental accounting. *See, e.g., Sioux Tribe* v. *United States*, Docket 119, 34 Ind. Cl. Comm. 230 (1974) (discussions of exceptions No. 3 and No. 10); *Blackfeet and Gros Ventre Tribes, supra*, at 67. Plaintiff has already indicated its intention of filing supplemental exceptions to the accounting. We therefore will deny plaintiff's motion. We further discuss below, the matter of supplemental accountings.

Plaintiff's Motion for Post-1946 Accounting

Finally, plaintiff requests an amendment which would contain a request for a supplemental accounting in all three dockets from August 13, 1946, to date. As we have noted above, such a motion is not now appropriate.

Furthermore this question was raised by plaintiff previously herein, and has been discussed and disposed of by the Commission. See 31 Ind. Cl. Comm. at 53. As we stated there, the United States will be ordered to supplement its accounting beyond August 13, 1946, only after it has been disclosed that defendant was guilty of pre-1946 wrongdoings which continued after that date.

For the above reasons plaintiff's motion to amend the petitions in all three dockets so that they include requests for an accounting from August 13, 1946, to date will be denied without prejudice.

Future Proceedings

Defendant has included in its response to plaintiff's motion a request that plaintiff be precluded from filing further exceptions to the accounting report. Defendant apparently has in mind a motion filed by plaintiff on December 17, 1973, which requested six months to file supplemental exceptions. None have yet been filed.

Since present counsel for plaintiff now has had adequate time to become familiar with these dockets and the applicable law, he should be able to act promptly. We will therefore grant plaintiff until February 19, 1975, within which to file any amended or supplemental exceptions to defendant's accounting report.

Plaintiff's claims 1 through 6, and claim 8, in Docket 69 are not accounting matters and they therefore will be separated from the consolidated accounting claims in Dockets 69, 299 and 353.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

We concur:

/s/ JOHN T. VANCE
John T. Vance, Commissioner

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

/s/ BRANTLEY BLUE
Brantley Blue, Commissioner

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 69

(Claims 1 through 6 and Claim 8)

(Liability Claims)

(Filed January 23, 1978)

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Indians; relation back of petition amendments to avoid statute of limitations bar; estoppel through treaty violations by tribe; trespass of aboriginal lands; fair and honorable dealings coverage; specificity requirements for petition; fiduciary relationship; individual versus tribal claims; lack of jurisdiction to invalidate treaty; jurisdiction to revise treaty; educational breach of treaty; prior adjudication as to mineral resources; facilities breach of treaty; Act restricted to monetary relief.

William C. Schaab, attorney of record, for plaintiff. *Rodney, Dickason, Sloan, Akin & Robb, P.A.*, of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Opinion on Motion to Dismiss or for More Definite Statement *

BERNHARDT, *Trial Judge:* All briefs on the defendant's combined motion were filed with the Indian Claims Commission and were pending without ruling when jurisdiction of the case was transferred to the Court of Claims on December 29, 1976, pursuant to Pub. L. 94-465 (90 Stat. 1990). Upon transfer to the court the case was assigned to the trial division for initial action, and by it referred to the above trial judge before whom the motion now awaits ruling.

The dual purpose motion is addressed to the Second Amended Petition filed April 12, 1976. In the introduction of its specific responses thereto, the plaintiff contends that the defendant's motion is dilatory and proscribed by the Commission's General Rules of Procedure (GRP) 6(c) providing that "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." The plaintiff submits that the defendant should first file its answer to the petition and thereafter test out matters of sufficiency of pleadings by means of a motion for summary judgment. In the discussion which follows the Rules of this court shall control as it is the current forum, although in respects here relevant our Rules, the GRP, and the Federal Rules of Civil Procedure (FRCP) are identical.

In reply to the plaintiff's response the defendant contends that GRP 6(c), counterpart of our Rule 31(b) and FRCP 7(c), is not applicable, and that the defendant's motion is not dilatory.

Our Rule 31(b), copied from FRCP 7(c), is not applicable. FRCP 7(c) (and by analogy our Rule 31(b)), was designed to abolish preexisting technical rules by which certain defenses were formerly raised. Our Rule 38(b) (paralleling FRCP 12(b) and GRP 11(b)) permits certain

* The opinion and conclusion of law are submitted pursuant to Rule 54(a). The necessary facts are stated in the opinion.

defenses to be made by motion filed prior to the filing of an answer, including lack of jurisdiction over the subject matter and failure to state a cause of action for which relief can be granted. Our Rule 38(e), mirroring FRCP 12(e) and GRP 11(e), permits a pleader to move for a more definite statement of an ambiguous or vague antecedent pleading so that a suitable response may be framed.

From the standpoint of the rules, therefore, the fact that no answer has yet been filed to plaintiff's Second Amended Petition presents no technical bar to the filing of defendant's motion, provided the motion itself is not dilatory, which the plaintiff maintains but the circumstances negate. As originally filed in 1950 the petition contained eight claims. By permission of the Commission no answer was filed due to the intervention of accounting procedures, a protracted siege of motions, a deferred intention to file an Amended Petition, and finally the filing on October 1, 1969, of a First Amended Petition which withdrew the prayers for relief in all of the original eight claims except the accounting claim. Defendant answered the First Amended Petition promptly on November 4, 1969. New counsel for plaintiff was permitted on January 23, 1975, over objection of defendant, to file a Second Amended Petition "reformulating" the previously withdrawn non-accounting claims First through Sixth (35 Ind. Cl. Comm. 307 (1975)). The Second Amended Petition itself was not filed until April 12, 1976, due to much intervening activity in the case, including the defendant's motion of April 1, 1975, to the Commission for certification of this issue to this court, which was denied by the Commission's order of July 9, 1975. (36 Ind. Cl. Comm. 215 (1975).) Instead of filing an answer to the Second Amended Petition the defendant elected to file its present motion on June 3, 1976.

The plaintiff alleges that the pending motion is defendant's first effort to attack the legal sufficiency of non-accounting claims First through Sixth, and the Eighth

Claim, which were made in the original petition and are resurrected in the Second Amended Petition, after a 5½ year absence, but the record shows otherwise. On July 9, 1963, the defendant challenged the sufficiency of the non-accounting claims in a motion to sever or dismiss them but, after plaintiff's motion for an extension of time to respond, the Commission on August 23, 1963, denied defendant's motion without prejudice to its later refiling. The 27-year voyage of the case from there to here has been protracted but not quiescent. A glance at the voluminous docket entries, and the mounting pile of pleadings does not indicate that defendant has been dilatory in restating in its present motion a challenge to legal sufficiency whose gist was raised before but deferred.

Overview of Pleadings

At the opening of each of the seven claims following the First Claim in the Second Amended Petition (hereafter constantly termed "the petition") the plaintiff formally restates and reaffirms by reference all of the allegations in the paragraphs supporting each of the preceding claims, but not of course the prayers for relief in those preceding claims, with one exception. While each numbered claim in the petition has at the top a parenthetical title ostensibly denominating the scope of the particular claim (the titles are summarized in a table of contents accompanying the petition), in actuality there is much duplication and overlapping of allegations in the successive claims. Some of the claims pray for relief which infringes on the relief demanded or available in docket 229 (still pending before the Commission and involving alleged undercompensation for aboriginal lands ceded by plaintiff to the United States under the Treaty of 1868), or to be dealt with separately in the accounting claims now before the court in dockets 299, 353, and the Seventh Claim of docket 69. The extent of overlap and duplication with docket 229 and with the

separated accounting claims (dockets 299, 353, and the Seventn Claim of docket 69) will be discussed in considering the defendant's motion to dismiss particular claims on that ground.

The eight claims in the petition collectively allege about seven major causes of action involving alleged violations of plaintiff's 1850 and 1868 treaties,[1] title to aboriginal and reservation lands under the 1850 Treaty and reservation lands under the 1868 Treaty, coerced negotiation of 1868 Treaty, mistreatment of the Indians in violation of fair and honorable dealings and guardianship standards in various ways (sanctioned or encouraged trespassing by third parties, denial of guarantees relating to education, health, and welfare, removal of minerals, agricultural assistance, breach of treaty obligation to construct facilities, breach of alleged agreement to return homelands as compensation for scout services rendered in 1886 War against the Apaches, damage to agricultural and grazing land), and the demand in the Seventh Claim for accounting. The First through Sixth Claims are the vital claims to consider at this time, since the Seventh Claim relating to accounting is to be separately considered with the accounting claims constituting dockets 299 and 353 (also before the court on transfer from the Commission); the Eighth Claim was purportedly dismissed by the Commission yet physically reappears in the latest petition without Commission permission being visibly requested.[2] However, some mention will be made of the Sev-

[1] Treaty of September 9, 1849, 9 Stat. 974, 2 Kappler 583, ratified September 24, 1850 (hereafter "Treaty of 1850"). Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015, ratified July 25, 1868 (hereafter "Treaty of 1868").

[2] In the discussion under Part XVIII of defendant's motion, *infra*, which moves the dismissal of plaintiff's Eighth Claim, we discuss in detail the confusing procedural posture of the Eighth Claim, which survives in the petition due to the Commission's gratuitous ruling (36 Ind. Cl. Comm. 108 (1975)), despite the plaintiff's apparent abandonment.

enth and Eighth Claims in this opinion to the extent they are addressed by the defendant's motion.

Some of the series of eighteen roman numeral Parts of defendant's motion to dismiss present several separate grounds for the dismissal of each or parts of each of the eight claims in the petition. Thus, Part I of defendant's motion seeks dismissal of all seven non-accounting claims for procedural reasons. Parts II through IV seek dismissal or a more definite statement as to the First Claim. Parts V through VII are addressed to the Second Claim, Parts VIII and IX to the Third Claim, Parts X and XI to the Fourth Claim, Parts XII through XIV to the Fifth Claim, Parts XV and XVI to the Sixth Claim, Part XVII to the Seventh Claim, and Part XVIII to the Eighth Claim. There are collectively about eighteen grounds urged for dismissal, but no useful purpose would be served by describing them in general terms at this point since they will be explained in detail as each Part of defendant's motion unfolds.

Part I

In Part I of its motion the defendant requests dismissal of all but the Seventh Claim of plaintiff's petition because the other claims were voluntarily withdrawn from the original petition by the First Amended Petition and then, with sanction of the Commission, by its order of January 23, 1975 (35 Ind. Cl. Comm. 315), realleged in the latest petition as previously noted. Defendant claims that they are barred by the applicable statute of limitations, 25 U.S.C. § 70k, which requires such claims to be filed by August 13, 1951. To this extent the motion filed June 3, 1976, constitutes, in effect, defendant's belated motion for reconsideration by the Commission of its order of January 23, 1975, *supra*. The plaintiff responds that GRP 33(a) precludes a motion for rehearing filed beyond the 30 days allowed in that rule. GRP 33(a) is directed to rehearing of the Commission's "conclusions on its findings of fact", and thus does

not literally apply to a ruling on a question of law such as propriety of permitting petition amendments to reallege previously withdrawn claims that might otherwise be time-barred. However, GRP 33(b) applies to rehearing on errors of law, and it clearly makes defendant's motion untimely.

Despite that fact, we shall explore the grounds. The reasons given by the Commission for permitting reinstatement of the withdrawn claims were two: (1) the First Amended Petition withdrew only the prayers for relief and left standing the factual averments supporting the withdrawn prayers; (2) the Seventh Claim relating to accounting, which was left undisturbed in the First Amended Petition, formally restated and reaffirmed the allegations of fact in the other claims in the original petition. Hence, ruled the Commission, "since plaintiff's proposed reformulated claims [in the latest petition] are based on allegations of fact which have never been withdrawn, we will grant plaintiff's motion of July 1, 1974, to amend the petition." This despite the earlier recognition by the Commission that all non-accounting claims First through Sixth, and the Eighth had been withdrawn. 31 Ind. Cl. Comm. 40, 41 (1973).

At the request of the trial judge for clarification, the parties have filed supplemental briefs as to Part I of Defendant's Motion to Dismiss, in which the circumstances of the withdrawal and later reinstatement of the non-accounting claims are explored and authorities are cited to support competing views as to the validity of the Commission's authorization for the reinstatement of the withdrawn claims by allowing the filing of the latest petition.

The following facts are stated by plaintiff: The resignation of plaintiff's original counsel (Mr. Littell) on February 20, 1967, was followed on November 14, 1967, by the filing of defendant's motion to require plaintiff to break down the original petition into separate petitions so as to provide greater specificity in describing the claims or, in the alternative, to dismiss the petition. At that time plaintiff had no

counsel and did not have new counsel to succeed Mr. Littell until on or about November 21, 1968, when Harold Mott, Esquire, was engaged under contract as plaintiff's counsel. In the meantime defendant filed on March 11, 1968, a motion to dismiss for failure to prosecute which, at the instance of Mr. Mott, was denied by Commission order of December 26, 1968. Mr. Mott sought an extension of time to respond to defendant's motion of November 14, 1967, and was on December 23, 1968, given until September 30, 1969, to file an amended petition, which was the request made by him in his opposition to defendant's motion to dismiss for want of prosecution.

For reasons which are not entirely clear, but allegedly related to Mr. Mott's inability to obtain access to Mr. Littell's records plus the pressure of time and dearth of resources, instead of making the claims of the original petition more specific by dividing them into separate petitions as defendant had requested, or in some other fashion, Mr. Mott on October 1, 1969, filed a First Amended Petition which withdrew the prayers for relief in all non-accounting claims First through Sixth, and the Eighth, in the original petition. With this the defendant allowed its motion of November 14, 1967, to lapse without action, as though moot, which indeed it seemed to be at that juncture.

Neither the reason nor authorization for Mr. Mott's action in withdrawing all non-accounting claims is explained in the record. Speculatively, in part it may have been due to Mr. Mott's realization that the major demands for relief in docket 69 duplicated demands in docket 229. (Docket 229 has been retained by the Indian Claims Commission and is in the concluding phases of determination.) According to the Commission (35 Ind. Cl. Comm. 307 (1975)) the record does not indicate whether Mr. Mott had met the requirement of his attorney contract with the tribe that any adjustment of its claim by counsel (such as voluntary withdrawal of previously pleaded claims) would be subject to tribal

approval. The defendant had full notice of Mr. Mott's contract with the tribe, and thus is charged with knowledge of the extent or absence of his authority thereunder to withdraw claims without tribal approval. From this the plaintiff contends that defendant is estopped from relying on the acts of an agent (Mr. Mott) in withdrawing claims without tribal approval when it (the defendant) knew that the acts were beyond the scope of Mr. Mott's agency powers, if in fact they were.

The defendant contends that the Commission erroneously permitted the reassertion of the withdrawn claims by the plaintiff filing a Second Amended Petition long after the claims had been barred by the statute of limitations expiring August 13, 1951, per 25 U.S.C. § 70k. In its Supplemental Response the plaintiff relies on the recognized policy of liberality in permitting amendments to petitions under the Indians Claims Commission Act, citing *United States* v. *Lower Sioux Indian Community in Minn.*, 207 Ct. Cl. 492, 519 F. 2d 1378 (1975). There the court upheld the Commission in allowing an amendment adding to a petition claims for the taking of land to a claim for a general accounting, even after a stipulation of settlement as to all claims except the accounting claim had been entered into. The court's action was based upon GRP 13(c) which, consistent with the statute, "requires the test of notice if circumvention of a time limitation is to be permitted on the theory of relation back. In fact ,the rule defines that notice, permitting 'relation back', is present only if the amendment arose out of the same 'conduct, transaction, or occurrence' as presented in the original pleadings." *Id.*, at 503. The court felt that the original petition provided the requisite notice of the enlarged claim. See also *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 372 F.,2d 951 (1967), *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 393 F. 2d 786 (1968), and *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 490 F. 2d 954 (1974). In the *Snoqualmie*

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case the court held that the term "presented" in the limitation statute, 25 U.S.C. § 70k, "should be read liberally to permit an amended pleading to relate back where there is sufficient notice." In the two *Northern Paiute* cases the court allowed second and third amendments to the petition to add additional land to the claim area and to demand compensation for the removal of resources. If on the principal of relation back a new party and a new cause of action can be introduced in a case by amendment after expiration of the statutory period for the filing of claims, as in the *Snoqualmie* and *Paiute* cases, there is less reason to deny the revival of original claims that were previously dismissed under the circumstances described in the present case. This is particularly true where, as here, certain of the realleged claims may be intimately related to the subject matter of extant claims for accounting still in process, and to some extent to the claims in docket 229 pending before the Commission, thus providing the requisite notice to meet the relation back principal in GRP 13(c). No real disadvantage to the defendant can be seen in permitting the amendments to survive for the reasons assigned in Part I of the motion.

Part I of the defendant's motion for dismissal is denied on the merits, and not merely because it is untimely.

EXHIBIT A

57a

APPENDIX E

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Defendant*

First Amended Petition

To The Honorable Commissioners
Of The Indian Claims Commission:

The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims.

Respectfully submitted,

/s/ HAROLD E. MOTT
Harold E. Mott
First National Bank Bldg.—East
Suite 304
5301 Central Avenue, N.E.
Albuquerque, New Mexico 87108

Claims Attorney,
Navajo Tribe of Indians
Attorney of Record

5. *Reports.* Within twelve (12) months of the date of this contract, the ATTORNEY shall furnish a written report to the TRIBE and SECRETARY upon the status of the claims, setting forth the amount and nature of each claim, the issues of fact and law involved, an assessment of the work completed and remaining to be done, an estimate of the time that will be required to secure final judgment or other appropriate disposition, and a program for its prosecution. Such report shall be supplemented each six (6) months throughout the term of this contract.

6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY.

7. *Assignments.* No assignment of the obligations of this contract, in whole or in part, and no assignment or encumbrance of any interest in the compensation to be paid herein shall be made without the consent, previously obtained, of the TRIBE and the SECRETARY; any such assignment or encumbrance in violation of the provisions of this paragraph, shall operate to terminate this contract. In the event of such termination, no person having any interest in this contract or in the compensation provided hereunder shall be entitled to any compensation whatsoever for services rendered subsequent to the date of termination.

August 22, 1968

Memorandum to Contract Files for Navajo Cases in Dockets Numbered: 69, 229, 298, 353

From: Donald Hyde

Mr. Harold E. Mott, General Counsel for the Navajo Tribe of Indians, was elected Claims Attorney for the Navajo Tribe by the Navajo Tribal Council on April 25, 1968 and a contract of employment between Mr. Mott as such claims attorney and the Navajo Tribe was executed by the parties on June 6, 1968. This contract of employment, however, was disapproved by the Department of the Interior. An Assistant Secretary of the Interior advised Mr. Mott and the Tribe, by letter, of certain amendments that Mr. Mott and the Tribe could make that would make the contract acceptable to the Department, so Mr. Lovell of the Bureau of Indian Affairs advised the Commission today (by telephone). Mr. Lovell thought it might be a matter of a few weeks before the contract will be eventually approved (after appropriate amendments are made in it).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and SMITH, *Judge*.

Order

The plaintiff has filed a motion for clarification of our opinion of June 13, 1979, in which we dismissed claims 1 through 6 and claim 8. In so doing, we stated that "This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets." (Footnote 1). Plaintiff now asserts that in this footnote we contemplated the possibility that the dismissed claims still might be asserted as part of claim 7 in docket No. 69, a general accounting claim that has been consolidated with the accounting claims in docket Nos. 299 and 253, and which therefore was not before us.

Plaintiff is mistaken. Footnote 1 was intended to make clear that despite the dismissal of claims 1 through 6 and claim 8, those claims could be asserted in the other pending dockets (Nos. 229, 299 and 353) if in fact they "are present in those dockets." The determination whether the dismissed claims are so present is a matter for the trial judge. Obviously, we would not have dismissed claims 1 through 6 and claim 8 in docket No. 69 if we had contemplated that all of those claims could be fully pressed under claim 7 in that docket. To the contrary, we held that plaintiff's previous

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RE- 1983

HAROLD E. MOTT

1983 JUL 11 PM 1: 36 1300 SOUTH ALBERT PIKE
POST OFFICE BOX 3404
FORT SMITH, ARKANSAS 72903

7/8/83

Honorable Mark Andrews:
Chairman, Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Andrews:

While serving as Claims Attorney for the Navajo Indians, Ralph Barney, an attorney for the Department of Justice, in charge of Indian Claims, requested me, on three occasions to consolidate the several Claims then pending before the Indian Claims Commission. In particular, his argument to me was that the "Cover all" complaint in Case # 69 (#7) was sufficient to provide appropriate relief on all the Navajo Counts.

HAROLD E. MOTT

1500 SOUTH ALBERT PIKE
POST OFFICE BOX 2984
FORT SMITH, ARKANSAS 72902

I had my assistant research the Claims and Certain Consolidations were made.

The present Claims attorney, Mr. Schaat, believes, and he many times asserted that #7 does in fact Cover the Navajo Claims, yet to be certain of full protection for the Navajo Tribe he wishes the claims consolidated to be unconsolidated.

If Mr. Schaat feels this is necessary, and considering the governments early position, I strongly believe legislation should be passed to allow Counsel to proceed as he feels may be in the best interest of the Navajo Tribe. I feel further that the government itself, being the Navajo Indians is its wards should take all measures to insure their welfare.

Sincerely,

Harold E. Mott

EXHIBIT C #357

BEFORE THE INDIAN CLAIMS COMMISSION

Jean L. Hansen

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE INDIAN RESERVATION, NEW MEXICO, Petitioner, v. THE UNITED STATES OF AMERICA, Respondent.	Docket No. 22A
THE PUEBLO OF SAN ILDEFONSO ET AL., Petitioners, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 354
THE PUEBLO OF SANTO DOMINGO, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 355
THE PUEBLO OF SANTA CLARA, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 356

THE PUEBLO OF TAOS,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Defendant.
Docket No. 357

THE PUEBLO OF NAMBE,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Defendant.
Docket No. 358

MOTION TO VACATE STIPULATIONS
FILED MAY 4, 1959

Comes now the defendant, by its Assistant Attorney General, and moves this Commission for an order vacating and striking from the record in the above-entitled cases, the stipulations filed by the petitioner in Docket No. 22A on May 4, 1959. This motion is made on the following grounds:

1. Said stipulations diminish the aboriginal claim of the Jicarilla Apaches as set forth in the amended petition on file in Docket No. 22A.

2. The petitioner in Docket No. 22A has presented evidence, by expert testimony, which purports to show the exclusive use and

occupancy by the Jicarilla Apaches of the areas which said stipulations now purport to relinquish to other Indian claimants.

3. The said stipulations, being an attempt to adjust a claim alleged and purportedly proved by the Jicarilla Apaches, cannot be adjusted without the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribal Council.

4. That the petitioner, during the first hearing in this case, specifically stated that it claimed the areas which it now seeks to relinquish. (Tr. 560).

In support of this motion defendant states:

1. That by his contract with the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico, the attorney for said tribe is prohibited from making any adjustment of any claim pending on behalf of the tribe without the approval of the Commissioner of Indian Affairs.

2. That it appears that the stipulations filed on May 4, 1959 with the Commission are an attempt to make an adjustment of the claim of the Jicarilla Apache Tribe without the approval of the Commissioner of Indian Affairs.

3. That such an attempt on the part of the attorney for the Jicarilla Apache Tribe is an act outside the scope of his employment as more fully appears from his contract of employment on file with the Commission.

4. That neither this Commission nor any court has the power to enlarge the scope of the attorney's employment without the consent of the Jicarilla Apache Tribe and the Commissioner of Indian Affairs.

5. That the stipulations filed on May 4, 1959 purport to do something which the Jicarilla Apache attorney is expressly, by his contract, prohibited from doing without the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribe.

6. That the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribe not having been given, the said stipulations are a nullity and should be expunged from the record in these cases.

7. That the letter of the attorney for the petitioner in Docket No. 22A, transmitting the said stipulations, states that said stipulations are based on the best evidence available to the respective claimants, including the Jicarilla Apache Tribe.

8. That heretofore and during the week of December 1, 1958, a partial hearing was held on the Jicarilla Apache claim and at such hearing the petitioner offered the testimony of two expert witnesses, namely Dr. Albert H. Thomas, Historian, and Dr. Frank C. Hibben, Anthropologist.

9. That both Drs. Thomas and Hibben testified that the Jicarillas occupied and exclusively used the areas which the said stipulations now attempt to relinquish to the claimants in Dockets

Nos. 354, 355, 356, 357 and 358.

10. That the attorney for the petitioner in Docket No. 22A is repudiating the testimony of his own experts given at the hearings of December 1-5, 1958 when he states that "* * * the best evidence available * * * *" shows that his own experts' testimony is not to be relied upon.

11. That the action of the attorney for the petitioner in Docket No. 22A, in repudiating the testimony of his own experts, should certainly be carefully considered by the Commission before allowing stipulations, which in essence repudiate such testimony, to remain in the record of these cases.

WHEREFORE, defendant requests:

1. That the Commission enter an order directing the stipulations filed by the petitioner in Docket No. 22A on May 4, 1959 be expunged and stricken from the record in these cases.

2. That pursuant to Section 22(a) of the Commission's Rules of Procedure, an oral hearing be held hereon.

Respectfully submitted,

PERRY W. MORTON
Assistant Attorney General

William H. Lundin
Attorney

I hereby certify that on the 13 day of May, 1959 one (1) copy of the above and foregoing motion was mailed to each of the attorneys of record in the above-captioned cases as follows:

Docket No. 22A	Guy Martin, Esquire 910 - 17th Street, N. W. Washington 6, D. C.
Dockets Nos. 354, 355, 356, 357 and 358	Darwin P. Kingsley, [illegible], Esq. 230 Park Avenue New York 17, New York

William H. Lundin
Attorney

EXHIBIT O-1

BEFORE THE INDIAN CLAIMS COMMISSION

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE INDIAN RESERVATION, NEW MEXICO,

Petitioner,

v. Docket No. 22-A

THE UNITED STATES OF AMERICA,

Defendant.

THE PUEBLO OF TAOS,

Petitioner,

v. Docket No. 357.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER APPROVING STIPULATION

Coming on for consideration the Stipulation between the attorneys of the parties to the above numbered and entitled causes filed herein on May 4, 1959, which Stipulation has been approved by the Commissioner of Indian Affairs, as shown by letter dated July 10, 1959, addressed to Martin and Burt, Attorneys at Law, (copy of which is filed with this Commission); and the Commission being of the opinion that said Stipulation should be approved;

IT IS HEREBY ORDERED AND DECREED that said Stipulation be filed as a part of the record in the above causes and that same be and it is hereby in all things allowed and approved.

Dated at Washington, D. C., this 21st day of July, 1959.

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner

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Docket 22A, 355

Jean R Hess

Corrected Copy
Same Copy filed in #355 on 7/12/57

STIPULATION

It is hereby stipulated and agreed between the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico, Petitioner in Docket No.22A and the Pueblo of Santo Domingo, Petitioner in Docket 355,

(a) that the northern boundary line of the land claim asserted by the Pueblo of Santo Domingo in Docket No. 355 is defined in relevant part as follows:

> From the point where Peralta Canyon intersects the south boundary of the Canada de Cochiti Grant, near 35°40'30" N, 106°26' W, along Peralta Canyon to La Jara Spring, near 35°42' N, 106°32' W; thence southwesterly to Bear Spring at a point on the south boundary of the Canada de Cochiti Grant near the intersection of the line of 35°40'30" N with the line of 106°35' W.

(b) that the southern and eastern boundaries of the land claim asserted by the Pueblo be defined in relevant part as follows:

> From a point near 35°20' N, 106°20' W southeasterly to a point near 35°16' N, 106°12'30" W, immediately north of Golden, thence northeasterly to a point near 35°28'30" N, 106°8' W.

It is further stipulated and agreed that the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation disclaims any area lying immediately south of the line defined under (a) and immediately north and west of the line defined under (b) and that the Pueblo of Santo Domingo disclaims any area lying north of the defined line under (a) and south and east of the line defined under (b) or any other areas still claimed by Petitioners in Docket No. 22A and it is further agreed that copies of this stipulation shall be filed in Dockets Nos. 22A and 355, respectively.

s/ GUY MARTIN
GUY MARTIN
Attorney for Petitioners in Docket No. 22A

s/ DARWIN KINSLEY, JR.
Attorney for Petitioner in Docket No. 355

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington 25, D. C.

Martin and Hart
Attorneys at Law
Barr Building
Washington 6, D. C.

Gentlemen:

This responds to your letters of June 3 and 23, concerning the adjustment of claims of the Jicarilla Apache Tribe involved in Docket 22-A before the Indian Claims Commission.

In your letter of June 3, you stated that the area claimed by the Jicarillas covers approximately 46,000,000 acres of land and that certain other tribes in their petitions filed before the Commission alleged that certain portions of these lands were rightfully theirs either by exclusive use and occupancy or by virtue of title granted by treaty. Several of these overlapping claims will have to be decided by the Commission on the basis of evidence submitted before it. You state, however, that five relatively small tracts of land within the larger territory have been claimed by various Pueblos. The tracts are indicated on a map which was enclosed with your letter. The Pueblos have been joined as parties in Docket 22-A for the purpose of considering these overlapping claims.

Your letter of June 3 also advised that the attorneys for both the Jicarilla Apache Tribe and the Pueblos have fully considered all the facts pertaining to these overlapping areas and that you have mutually reached certain conclusions which are deemed to be in the best interest of both groups. These conclusions have been embodied in five stipulations between the Pueblos and the Jicarilla Apache Tribe, whereby the original claim of the said Apache Tribe has been redefined so that certain small areas are released to the Pueblos. Copies of the stipulations accompanied your letter. The stipulations were filed with the Indian Claims Commission, but the Government moved to vacate said stipulations on the theory that the attorneys for the Jicarilla Apaches are prohibited by their attorney contract from making any compromise, settlement or adjustment of any claim of the

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tribe. The Indian Claims Commission requested that you submit the stipulations for the Commissioner's approval.

The portion of the attorney contract in question reads:

"Compromise: The said Attorney shall make no compromise, settlement, or adjustment of any claim pending on behalf of the Tribe, or that may be brought under this contract; nor shall the Attorney agree to a termination of any claims proceeding at an intermediate stage without the approval of the Commissioner of Indian Affairs."

In concluding your letter of June 3, you stated your belief that it is in the best interest of the Jicarilla Apache Tribe to execute the stipulations so that you may be enabled to proceed with the case without this element of conflict which otherwise may delay the proceedings for several years.

In your letter of June 23 and at a conference of the [illegible] date in the office of the Deputy Solicitor for this Department, you indicated the substantive reasons why you have concluded that the boundaries of the Jicarillas' claims should be redefined in accordance with the stipulations. Basically, these are that research made after filing the petition in Docket 22-A disclosed that the Jicarillas have no evidence which can reasonably be expected to prevail over the evidence of use and occupancy which the Pueblos can show for the relatively small areas which they claim within the approximately 16,000,000 acres claimed by the Jicarillas. The associate attorney of the attorney employed by the Pueblos in a letter dated June 23 has substantiated your information as to the nature of the evidence of use and occupancy which the Pueblos have.

Your letter of June 23 was accompanied by a statement signed by three persons claiming to constitute a majority of the Executive Committee of the Jicarilla Apache Tribe. The statement is to the effect that the signers have discussed the stipulations with you and are satisfied that they are in the best interest of the tribe. The signers approve the execution and filing of the stipulations in Docket 22-A. You state in your letter that a formal resolution approving the stipulations on the part of the tribe itself will be forwarded in the near future.

On the basis of the foregoing information, we have no objection to the modification of the Jicarillas' claim in Docket 22-A, as provided in the stipulations enclosed with your letter of June 3.

Sincerely yours,

s/ Thomas M. Reid
Assistant Commissioner

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BEFORE THE INDIAN CLAIMS COMMISSION

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE INDIAN RESERVATION, NEW MEXICO, Petitioner, v. THE UNITED STATES OF AMERICA, Respondent	Docket No. 22A
THE PUEBLO OF SAN ILDEFONSO ET AL., Petitioners, v. THE UNITED STATES OF AMERICA, Defendant	Docket No. 354
THE PUEBLO OF SANTO DOMINGO, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant	Docket No. 355
THE PUEBLO OF SANTA CLARA, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant	Docket No. 356

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THE PUEBLO OF TAOS, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 357
THE PUEBLO OF NAMBE, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 358

RESPONSE OF PETITIONERS, THE JICARILLA APACHE TRIBE, TO DEFENDANTS MOTION TO VACATE STIPULATIONS

Petitioner, the Jicarilla Apache Tribe, by its attorneys moves this Commission for an order denying in full Defendants motion to vacate stipulations filed May 4, 1959.

1. Conferences with attorneys for the Pueblo tribes indicated that there is a reasonable doubt as to the exclusiveness of the Jicarilla's use and occupancy of the lands to which the stipulations involved here relate. It should be noted that the Pueblos were an agricultural tribe as contrasted with the Jicarillas, who were hunters, and an exact determination of their respective boundaries one hundred years later is not possible. For this reason the expert testimony on behalf of the Jicarillas in Docket No. 22A, as to these particular lands in question, necessarily delineated the boundaries with a broad brush and with an acknowledged lack of precision.

2. The stipulations in question affect less than 1% of the total area of the Jicarilla's claim in Docket No. 22A. This is in no sense

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a compromise settlement or adjustment of the claim first, because that language applies to a compromise, settlement and adjustment of the entire claim; and second, because the diminution of an area to which substantial doubt has been raised is not a compromise, settlement or adjustment but a refinement of the basic claim. Indeed, this is an affirmative responsibility of counsel in their proceedings. It was the thought of the parties that the stipulations would facilitate disposition of the proceedings and that they would be of assistance to the Commission in its ultimate resolution of the basic issues involved in this claim.

3. The Government's argument would lead to a conclusion that the Commissioner of Indian Affairs would be required to approve the Tribe's complaint, any amendments, any stipulations made in open hearings before the Commission, or any action by the attorneys which might result in the loss of compensation for small portions of territory. Such interpretation is inconsistent with an attorney's duty to his client.

4. We respectfully submit that the Defendant's motion to strike the stipulations is frivolous and should be summarily denied.

Guy Martin
Attorney for Petitioners

Roy T. Mobley
Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 1959 one copy of the above and foregoing Response to Defendants Motion was delivered by hand to William H. Lundin, Department of Justice, Attorney for Defendant, and to Darwin P. Kingsley, Jr. Esq., c/o Richard Schifter, Attorney of Record in Docket Nos. 354, 355, 356, 357 and 358.

Guy Martin

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EXHIBIT E

(Cite as 624 F.2d 981 (1980))

The NAVAJO TRIBE OF INDIANS

v.

The UNITED STATES.

Nos. 69, 299 and 353.

United States Court of Claims.

May 28, 1980.

In litigation under the Indian Claims Commission Act with respect to accounting claims of the Navajo tribe, parties sought review of trial judge's rulings. The Court of Claims, Davis, J., held that: (1) trial court properly decided that certain claims should be dismissed as barred by limitations and properly ruled that dismissed claims could not be asserted as part of general accounting claim; (2) trial judge's position on application of fiduciary relationship to accounting claims was proper; (3) trust relationship between Government and Navajo tribe created duty on Government's part to account for its management of tribe's timber, including accounting for proceeds of sales of fire-damaged timber; (4) tribe could properly recover improper treaty expenditures, (5) trial judge acted within his discretion in construing certain subexception as request for accounting, (6) remand was required for consideration of claim with respect to Government's obligation to make tribal funds productive either by depositing them in interest-bearing account or by investing them fruitfully; (7) Government's obligation under 1868 Treaty to provide education for Navajos lasted for no more than ten years; and (8) other issues required reconsideration.

Remanded.

1. United States ⇐105

In Indian accounting cases, once plaintiff has filed exceptions to accounting, trial judge should not mechanically allow defendant to file motions to dismiss or to strike, or for more specific statement; rather, trial judge should decide in each instance, perhaps after pretrial conference, which issues raised by exception should be sent directly to trial, as to which issues the parties should be directed or permitted to file motions for summary judgment, which issues should be clarified by further filings or submissions by plaintiff of defendant and, if motion to dismiss or for summary judgment is allowed to be filed, whether trial judge or court should initially decide that dispositive motion. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

2. United States ⇐105

Objective in Indian accounting claims litigation should always be to conclude litigation as speedily and simply as feasible, without needless or burdensome steps or complications. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

3. United States ⇐105

There must be an end to the filing of exceptions to existing accounting reports in Indian accounting cases; thus, supplemental exceptions filed before judge must be the last. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

4. United States ⇐105

In litigation under Indian Claims Commission Act relating to accounting claims of Navajo tribe, trial judge properly dismissed certain claims and ruled that they could not be asserted as part of another general accounting claim. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

5. Fraud ⇐50

Existence vel non of a fiduciary relationship can be inferred from nature of transaction or activity.

6. Indians ⇐6

Where federal Government takes on or has control or supervision over Indian tribal monies or properties, fiduciary relationship normally exists with respect to such monies or properties unless Congress has provided otherwise, even though nothing is said expressly in authorizing or underlying statute or other fundamental document about trust fund or trust or fiduciary connection.

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7. United States ⇐105

Application of fiduciary relationship was proper with respect to accounting claims of Navajo tribe under Indian Claims Commission Act. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

8. Indians ⇐6

Trust relationship between Government and Navajo tribe created duty, on Government's part, to account for its management of tribe's timber, including an accounting for proceeds of sales of fire-damaged timber. Act Mar. 4, 1913, 37 Stat. 1015; Treaty with the Navajo Indians, arts. 1 et seq., 2, 15 Stat. 667.

9. Indians ⇐3

Contract such as Indian treaties should be scrutinized to determine whether fiduciary duties of Government were met.

10. Indians ⇐3

In the use of Indian treaty funds, Government is subject to fiduciary accounting principles, regardless of whether shortages in treaty funds may also be termed contractual breaches.

11. Indians ⇐3

Where Government, acting as fiduciary, has improperly charged expenses to Indians when they actually benefited Government or other third parties, or has failed to expend funds appropriated for benefit of Indians in manner provided for by treaty, such amounts are properly excepted to and may be recovered by an Indian tribe, however, tribe can recover only for improper treaty expenditures to extent that they exceed any offsets to which Government is entitled. Indian Claims Commission Act, § 2, 25 U.S.C.A. § 70a.

12. Indians ⇐6

Once Congress has appropriated money specifically for Indian tribe's benefit, tribe has legitimate right to know whether any of those appropriations were applied to non-tribe beneficiaries in contravention of appropriation acts.

13. Indians ⇐6

To recover interest or damages for non-investment of Indian trust funds, Indians must show statutory, treaty, or contract authority calling for payment of interest or for investment of tribal funds.

14. United States ⇐105

In litigation under Indian Claims Commission Act with respect to accounting claims of Navajo tribe, remand was required for consideration of extent of Government's obligation to make tribal funds productive either by depositing them in interest-bearing accounts or by investing them fruitfully. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

15. Indians ⇐3

Government's obligation under 1868 treaty with Navajo tribe to provide education for Navajos lasted no more than ten years. Act May 25, 1926, § 28, 40 Stat. 561; Act June 24, 1938, 52 Stat. 1037.

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Before FRIEDMAN, Chief Judge, and DAVIS and SMITH, Judges.

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ON REQUESTS FOR REVIEW OF TRIAL JUDGE'S OPINION

DAVIS, Judge:

Perhaps the most complex and troublesome of the remaining litigations under the Indian Claims Commission Act are the accounting claims of the Navajo Tribe (Nos. 69, 299 and 358). Since the transfer of these cases to us from the Commission in December 1976, the court has already passed five times upon separate aspects of one or another of the claims.[1] The present appeal concerns another very large chunk of those accounting problems.

The matrix of the case, as it comes to us, consists of a series of six accounting reports filed by the Government in 1953, 1958, 1960, and 1961 with respect to these accounting claims—mainly in docket No. 69. With the permission of the Commission, the Tribe filed, successively, numerous exceptions to these reports. The exceptions now before us are the supplementary exceptions. The Government then filed a motion to dismiss most of these supplementary exceptions (or to strike or for a more definite statement), giving its reasons in 145 separate parts of its motion.[2] Trial Judge Bernhardt has laboriously and carefully considered all aspects of this motion in an opinion (filed September 19, 1978) of some 188 pages which is now before us on requests for review by both sides.[3]

I

Our first task is to clear the field—to separate out the items which we should review at this time from those interlocutory rulings which are not appropriate for present appellate consideration but should be left for review (to the extent the issues survive) at the final conclusion of the Trial Division's determination. In *Navajo Tribe, supra*, 220 Ct.Cl. at —, 597 F.2d at 1365–66 (1979), the court decided that it would automatically review, as of right, decisions of the Trial Division on dispositive motions in transferred Indian cases. The corollary of that ruling is that interlocutory, procedural rulings of the trial judges are not to be reviewed as of right unless certified by the trial judge under Rule 58(c)(2)(i). In the absence of certification, such procedural rulings will not be reviewed on an interlocutory basis unless the strict conditions of Rule 58(c)(2)(ii) are satisfied.[4] Those are the provisions for interlocutory review which govern all non-appeal cases being handled in this court by a trial judge. No exception exists for Indian cases or, more specifically, for Indian accounting cases.[5]

1. *Navajo Tribe v. United States*, 218 Ct.Cl. —, 586 F.2d 192 (Oct.1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2163, 60 L.Ed.2d 1046 (1979); *Navajo Tribe v. United States*, 220 Ct.Cl. —, 597 F.2d 1362 (April 1979); *Navajo Tribe v. United States*, 220 Ct.Cl. —, 597 F.2d 1367 (April 1979); *Navajo Tribe v. United States*, 220 Ct.Cl. —, 601 F.2d 536 (June 1979), *cert. denied*, Feb. 19, 1980; *Navajo Tribe v. United States*, 222 Ct.Cl. —, 610 F.2d 766 (Dec.1979).

2. The trial judge tells us that the exceptions and motion briefs before him aggregated 739 pages.

3. The trial judge's opinion of September 19, 1978 (now on review) does not cover a number of additional accounting reports filed by the Government in June 1975 and later.

4. These standards are as follows: "[U]pon a showing of extraordinary circumstances whereby further proceedings pursuant to the said order [or ruling] would irreparably injure the complaining party or occasion a manifest waste of the resources of the court or of the parties. In general, the policy of the court is that proceedings before trial judges will not be interrupted by appeals to the court for piecemeal determinations, and the court will deal with the entire case or a properly severed aspect thereof, on a single occasion only. The mere fact that deferring correction of the trial judge's alleged error to the court's review of the trial judge's final decision may lead to a remand for a new trial, or for the taking of further evidence, or for reconsideration by the trial judge, or may cause delay in the ultimate disposition of the case, will not be deemed, by itself, to satisfy the standards of subdivision (ii)."

5. The rule that dispositive motions or decisions come automatically to the court does not encompass any sub-rule that interlocutory matters (on *other* subjects or claims) which happen to be included in the same opinion become reviewable as of right simply because they are made in the same opinion as a dispositive ruling on a separate subject or claim.

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In our view, most of the trial judge's rulings now brought before us fall into the category of interlocutory procedural decisions which do not merit prompt or immediate review under Rule 53(c)(2)(ii).[6] On the Government's appeal, many of the challenged rulings deal with such routine procedural, non-dispositive matters as (a) the need for a more definite statement of a plaintiff's exception, (b) the necessity to cite specific statutes as the basis for an exception, (c) citation of irrelevant or incorrect statutes in an exception, (d) whether later filings or submissions by the defendant, or actions of the trial judge or the court, have mooted or answered an exception by the plaintiff, (e) whether plaintiff or defendant has better access to certain information or records, (f) whether the Government should hand over or make available to the Tribe certain records, documents, or materials, (g) how far the Government must go in explaining to plaintiff its handling of tribal funds or property, (h) deferral of decision by the trial judge until further clarification by the parties or until a later stage in the proceedings,[7] (i) whether certain issues are more appropriately considered in later or separate proceedings, (j) denial by the trial judge of parts of the defendant's motion to dismiss an exception without prejudice to the Government's later renewal of the same issue, (k) claims by the Government that plaintiffs have split a single cause of action, (l) consolidation of various claims, and (m) rulings on plaintiff's motion to renew interrogatories. In addition, the defendant complains of several statements in the trial judge's opinion which are obviously dicta or preliminary observations rather than firm holdings. We include in the same class of interlocutory rulings holdings that the facts are not clear or developed enough to permit a proper disposition of the exception at this time.

For its part, plaintiff raises such comparable procedural, non-dispositive issues as (a) whether the citation in an exception of certain legislation is exclusive or illustrative; (b) the amount and detail of government information to which the Tribe is entitled; (c) the amount of specification which may be required of plaintiff at the exception stage of the accounting proceeding; (d) deferral of rulings by the trial judge until a later stage of the proceedings; and (e) rulings (or failures to rule) on burden of proof and the burden of going forward with the evidence. Like the Government, the Tribe also challenges some plain dicta in the trial judge's opinion.

We see no adequate reason why we should pass at this time on procedural or non-dispositive rulings of this type. They are truly interlocutory, subject to the trial judge's discretion, and may "wash out" in the course of the further proceedings. Nor do they meet our normal standards for immediate, interlocutory review (as described above). If we were to review, as of right, such rulings or statements in Indian accounting cases, we would be undertaking an enormous, perhaps impossible, burden—as this case demonstrates conclusively—without concomitant benefit to the proceedings or the litigation. We would also be prolonging these Indian accountings by all the months needed for the submission, argument, and decision of numerous interlocutory appeals.

Accordingly, we decline now to consider or rule upon all parts of Trial Judge Bernhardt's decision except those portions specifically mentioned and considered in the ensuing discussion (Parts III–X of this opinion). The group of rulings which we shall not consider includes, as well, the segments of the trial judge's opinion to which neither party has excepted, and in addition certain

6. The trial judge has certified none of the rulings for review, possibly because he considered that they would be reviewed as of right by the court.

7. For instance, the trial judge deferred decision on issues which he thought would be controlled by decisions of the court in cases not yet argued or decided by us at the time he rendered his decision—particularly the *Navajo Tribe* case, *supra*, 218 Ct.Cl. —, 586 F.2d 192, involving the coverage of the Indian Claims Commission Act of "continuing wrongs" occurring after August 1946.

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procedural questions with dispositive facets or overtones which we deem unworthy of separate consideration at this stage.

In declining to consider these parts of the trial judge's opinion, we do not adopt or refuse to adopt them. More than that, we neither approve nor reject them, nor intimate any view as to their contents or merits. The trial judge is free to reconsider them or to change them as he deems appropriate in view of later decisions, later occurrences in the litigation, or changes in his position.

II

[1] Profiting from the unfortunate experience on these Navajo accounting claims, we direct that in the future the Trial Division, once a plaintiff has filed exceptions to an accounting, should not mechanically allow the defendant to file motions to dismiss or to strike, or for a more definite statement, etc. Instead, in Indian accounting cases the trial judge should decide in each instance—perhaps after a pretrial conference—(a) which issues raised by exception should be sent directly to trial, (b) as to which issues the parties (or one party) should be directed or permitted to file motions for summary judgment (or motions to dismiss) which can be decided separately from the trial,[8] (c) which issues should be clarified by further filings or submissions by plaintiff or defendant (including the filing of an answer to the exception) before those issues are set for trial or scheduled for disposition by dispositive motion, and (d) if a motion to dismiss or for summary judgment is allowed to be filed, whether the trial judge or the court should initially decide that dispositive motion.

[2] The objective should always be to conclude the litigation as speedily and simply as feasible, without needless or burdensome steps or complications. *See* Part IV *of Navajo Tribe, supra*, 220 Ct.Cl. at —, —, 601 F.2d at 540 (1979); *Temoak Band of Western Shoshone Indians v. United States*, 219 Ct.Cl. —, —, 593 F.2d 994, 998-99 (1979), *cert. denied*, — U.S. —, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). As Chief Judge Friedman said in *Navajo Tribe*, *supra*: "There is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years. We have faith in the ability of the trial judges to develop such techniques." 220 Ct.Cl. at —, 601 F.2d at 540.

[3] There is a cognate problem to which we must also refer. In these Navajo cases, the trial judge commented unfavorably on the continuous flow of exceptions and supplemental exceptions from the plaintiff, and ruled that the supplemental exceptions then before him "must be the last." We confirm and emphasize that holding.[9] There must be an end to the filing of exceptions to the existing accounting reports in these Navajo cases, and in other Indian accounting cases there should not be allowed the successive filings of exceptions to the same reports which have been permitted in the present cases.[10]

III

Before we consider those portions of the trial judge's opinion which we shall review,

8. It is open to the trial judge to decide, in his discretion, that even though an issue is technically or substantively eligible for disposition by summary judgment or motion to dismiss, it should nevertheless be included in the issues to be tried in the accounting trial.

9. The Commission allowed the plaintiff to file the supplementary exceptions which are the foundation of the trial judge's opinion now before us. Though the defendant renews its objection to the allowance of that filing, we consider it too late in the day, and inappropriate at this time, to go back on, or reverse, the Commission's order permitting the filing.

10. As Trial Judge Bernhardt pointed out, "It has been 17 years since the filing of the 1961 [Accounting] Report as which the present supplemental exceptions are aimed. The grist of the supplemental exceptions could have been filed at the time the original exceptions were filed in 1970, and for the most part (so far as we can determine from a cursory comparison) relate to new matters not raised before. Advent of new counsel may explain, but does not extenuate, endless second thoughts as to deficiencies of the 1961 Report."

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we deal with a separate contention raised by both sides at the oral argument. After the trial judge's opinion was issued, the court decided that claims 1 through 6 and claim 8 in docket No. 69 should be dismissed as barred by limitations. *Navajo Tribe*, *supra*, 229 Ct.Cl. at ——, 681 F.2d at 839–40. In its order denying rehearing of that decision (Sept. 28, 1979), the court ruled that the dismissed claims could not be asserted as part of claim 7 in docket No. 69—the general accounting claim now before us.

At the argument government counsel urged repeatedly that many of plaintiff's exceptions under claim 7 involved the same subject matter or claims as did the dismissed claims and were therefore precluded, under the order of September 28, 1979, from inclusion in general accounting claim 7.

We think that in the breadth of its approach defendant has misconstrued the September 28th order. That order was not meant to delete any true accounting claims already included in claim 7—an all-inclusive claim that asked the Government to account generally and properly for its handling of the Tribe's monies or property over which the Government had exercised control or supervision—simply because the specific item happens to deal with the same general subject matter (*e. g.* land, oil, gas or education) as a dismissed claim. What the September 28th order did, and was meant to do, was to prevent plaintiff from attempting to restate and reinvigorate the dismissed claims, which were *not* accounting claims, in the form (if not the substance) of accounting claims in order to try to bring them now, for the first time, under claim 7. But true accounting claims, involving the disposition of tribal funds and property, have always been warp and woof of claim 7, and they remain so. If the issue is whether the Government, as fiduciary, faithfully managed or used Navajo assets, claim 7 covers the question.

For instance, one of the dismissed claims was that the Government failed to provide educational and other services to the Navajos. The dismissal of that claim does not prevent the plaintiff from urging that defendant must account for the use and disposition of educational monies appropriated by Congress to or for the use of the Navajos specifically; the latter aspect is and has always been fully a part of the general accounting claim we are now considering. On the other hand, the broader contention that the United States failed, apart from the obligations of the 1868 treaty, to appropriate or make available sufficient funds to educate the Navajos to the proper level and in the proper fashion—a contention also apparently contained in the dismissed claim—could not now be restated or included under claim 7.

[4] On this issue of the dismissal of claims 1–6 and 8, the Tribe takes a converse position which we also reject. It says that claim 7 is not merely a true accounting claim, that it likewise covers any "fair and honorable dealings" claim tied to a subject mentioned in the petition—whether or not that "fair and honorable dealings" claim involves federal management of Navajo property or funds. On this basis, plaintiff urges that the dismissed claims 1–6 and 8 can all fall squarely within claim 7. This interpretation of claim 7, however, is obviously contrary to our decision of June 1979 in *Navajo Tribe*, *supra*, and to the rehearing order of September 28, 1979. More than that, the Tribe's argument stretches claim 7 far beyond its proper accounting confines. That claim has always been treated and considered as purely an accounting claim, and we think that it must be restricted to that compass. "Fair and honorable dealing" claims, not involving the Government's management and use of Navajo assets, do not come at all under claim 7.

IV

[5] On the Government's request for review, we take up first defendant's challenge to the trial judge's general discussion (in Part I of his opinion) of the fiduciary relationship between the United States and the

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Indians.[11] Defendant contends that no fiduciary obligation can arise unless there is an *express* provision of a treaty, agreement, executive order or statute creating such a trust relationship, and the trust relationship is limited by the precise terms of the document. If by this the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree. The existence *vel non* of the relationship can be inferred from the nature of the transaction or activity.

[6] In particular, where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *See Seminole Nation v. United States*, 316 U.S. 286, 296–300, 62 S.Ct. 1049, 1054, 1056, 86 L.Ed. 1480 (1942); *Menominee Tribe of Indians v. United States*, 101 Ct.Cl. 10, 18–20 (1944); *Menominee Tribe of Indians v. United States*, 102 Ct.Cl. 555, 562 (1945); *Navajo Tribe v. United States*, 176 Ct.Cl. 502, 507, 364 F.2d 320, 322 (1966); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct.Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Coast Indian Community v. United States*, 213 Ct.Cl. 129, 152–54, 550 F.2d 639, 652–53 (1977). In *Menominee Tribe, supra*, we held explicitly that a special jurisdictional statute making ordinary fiduciary standards applicable to the United States, "add[s] little to the settled doctrine that the United States, *as regards its dealings with the property of the Indians*, is a trustee." (emphasis added). 101 Ct.Cl. at 19. Likewise, *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322, observed that "[n]umerous cases have expressed the notion that, *when dealing with Indian property*, the Government may be acting as a 'trustee.'" (emphasis added).

The same principle—that for Indian tribal property there need not be express designation of special status—is reflected in other opinions. *In Cramer v. United States*, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923), the Supreme Court voided a federal land patent which had granted Indian-occupied lands to a railway. Relying heavily on the trust relationship with the Indians, and the national policy protecting Indian land occupancy, the Court found that the general statutory authority of federal officials to issue land patents was limited, even though Indian occupancy of the lands was not expressly protected by treaty, executive order, or statute. *Id.* at 227–29, 43 S.Ct. at 344. The Court stated that "[t]he fact that such [Indian] right of occupancy finds no recognition in any statute or other formal Governmental action is not conclusive." *Id.* at 229, 43 S.Ct. at 344. *See also, Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113, 39 S.Ct. 185, 186, 63 L.Ed. 504 (1919) (even in the absence of a treaty or statute protecting Indian lands from sale by the Government, the court could enjoin the Government from treating Indian lands as public lands and disposing of them under public land laws); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1238, 1245–46 (N.D.Cal.1973) (the duty to make trust property income productive arises from the trust relationship between an Indian tribe and the United States; it exists even in the absence of a specific statute). *Cf. Pyramid Lake Paiute Tribe of Indians v. United States*, 354 F.Supp. 252, 257 (D.D.C. 1973), *rev'd on other grds.*, 499 F.2d 1095 (D.C.Cir.1974) (although no treaty or statute was violated by the Government's actions relating to the diversion of water from an Indian reservation to a federal dam and reclamation project, the Government was enjoined from proceeding with the diversion because the diversion would be in violation of the Government's trust responsibility to the tribe).

11. Though this issue does not arise in the context of a dispositive ruling (in Part I of the trial judge's opinion) we consider it now because we view it as a seminal question for all of the further proceedings in this accounting and in other Claims Commission Act accountings.

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On the other hand, if no tribal money or property is involved and the question is, for instance, whether the United States has a general fiduciary obligation to educate Indians, the existence of the special relationship for that purpose depends upon the proper interpretation of the terms of some authorizing document (*e. g.* statute, treaty, executive order). *Gila River Pima-Maricopa Indian Community v. United States*, 190 Ct.Cl. 790, 797–98, 427 F.2d 1194, 1196, *cert. denied*, 400 U.S. 819, 91 S.Ct. 37, 27 L.Ed.2d 47 (1970).

[7] The present accounting claims all deal with the management and disposition of Navajo funds and property. Defendant's insistence on express or statutory terms of trust is therefore irrelevant to these claims. Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute (or other document). The general law of fiduciary relationships can be utilized to the extent appropriate. *Cf.* cases cited above and *Duncan v. United States*, 220 Ct.Cl. —, 597 F.2d 1337, 1346 (1979), remanded by Sup.Ct. for reconsideration, April 21, 1980, and see Part V of this opinion *infra*. This does not mean, however, that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States. We refer to such rules as the principle that once a breach of fiduciary duty is merely charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability.[12] In each situation, the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the Government and the particular tribe.

Accordingly, we reject defendant's appeal on this point, and affirm, in general, the trial judge's position on the application of the fiduciary relationship to these accounting claims.

V

Our holding in Part IV, *supra*, of this opinion leads us directly to affirmation of the trial judge's ruling rejecting defendant's motion to dismiss plaintiff's supplemental exception li (Part XIX of the trial judge's opinion). That exception states that the accounting report prepared in 1961 on the Navajo Tribe fails to account for sales of fire-damaged timber on tribal lands pursuant to the Act of March 4, 1913, ch. 165, 37 Stat. 1015, 1016. The act authorized the Secretary of the Interior to sell fire-damaged timber located on public and ceded Indian lands.

In accord with its general stance (see Part IV, *supra*), defendant takes the position that plaintiff is only entitled to an accounting based on a specific statute, treaty, agreement, etc. and that the particular statute relied on by plaintiff in requesting an accounting of sales of fire-damaged timber is inapplicable to these Navajo lands.[13] We need not reach the difficult question of whether the statute cited by plaintiff applies to plaintiff's lands,[13] since, as already indicated, we agree with plaintiff that defendant must account for its handling of plaintiff's timber, even in the absence of a specific statute requiring its sale or fruitful disposition.

The treaty of June 1, 1868, 15 Stat. 667, between the Navajo Tribe and the United States, while it did not specifically speak to plaintiff's timber rights or defendant's responsibilities for them, did create a reservation for plaintiff, in Article II. From the creation of this reservation, certain rights and responsibilities emerged. One of the

12. Defendant's argument is based on its interpretation of "ceded Indian lands," which defendant contends was not intended to cover plaintiff's lands. *See* 48 Cong.Rec. 9847 (1912).

13. The trial judge rejected defendant's interpretation of "ceded Indian lands," and found that plaintiff's reservation lands were covered by the 1913 Act.

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rights which plaintiff obtained was the right to timber on its tribal reservation lands. *See Oneida Tribe of Indians of Wisconsin v. United States*, 165 Ct.Cl. 487, 490–91 *cert. denied*, 379 U.S. 946, 85 S.Ct. 441, 13 L.Ed.2d 544 (1964); *United States v. Shoshone Tribe*, 304 U.S. 111, 116–18, 58 S.Ct. 794, 797, 798, 82 L.Ed. 1213 (1938). Those timber rights are a proper subject for a claim under the Indian Claims Commission Act. *Oneida Tribe, supra*, 165 Ct.Cl. at 490–92.

As we have said, the Government may not avoid its responsibility toward plaintiff's timber by arguing that the 1868 treaty did not expressly create a fiduciary relationship between plaintiff and the United States. *Oneida Tribe, supra*, 165 Ct.Cl. at 492–94. The relationship between defendant and the Indian tribes is a special one, see the discussion in Part IV, *supra*, and from it special responsibilities stem when the Government has control and supervision over tribal property. *Oneida Tribe, supra*, 165 Ct.Cl. at 493; *Seminole Nation, supra*, 316 U.S. at 296–97, 62 S.Ct. at 1049–1054, 86 L.Ed. 1480; *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322. This special trust relationship and the responsibilities it creates have been expressly held to extend to tribal timber. *Oneida Tribe, supra*, 165 Ct.Cl. at 493; *Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind.Cl.Comm. 65, 77–81 (1973), *reh'g denied*, 34 Ind.Cl. Comm. 122 (1974).[14] Moreover, this special or fiduciary relationship has been specifically found to exist between the Government and plaintiff Navajo Tribe with respect to tribal property. *See Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322.

Where a trust relationship between the Government and the Indians is established, the Government's actions "must [normally] be judged according to the standard applicable to a trustee engaged in the management of trust property." *Coast Indian Community, supra*, 213 Ct.Cl. at 153, 550 F.2d at 632. A "trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Restatement (Second) of Trusts § 172 (1959). *See also, Sioux Tribe of Indians v. United States*, 105 Ct.Cl. 725, 802, 64 F.Supp. 312, 331, *cert. denied*, 327 U.S. 908, 66 S.Ct. 1045, 93 L.Ed. 1720 (1949); *Blackfeet & Gros Ventre Tribes, supra*, 32 Ind.Cl.Comm. at 85. In *Blackfeet*, the Indian Claims Commission specifically found a duty on the Government's part, to account for its efforts to salvage timber damaged by a catastrophic fire. *Id.* at 81.

[8] We find therefore that the trust relationship between the Government and the Indians creates a duty, on the Government's part, to account for its management of plaintiff's timber, including an accounting for proceeds of sales of fire-damaged timber. This duty exists independently of a statute requiring the sale or disposition of such timber. Accordingly, we affirm on this ground the trial judge's ruling denying defendant's motion to dismiss plaintiff's supplemental exception li

VI

Next, we consider defendant's request that we review and reverse the trial judge's ruling denying dismissal of plaintiff's supplemental exception 9 (Part CX of the trial judge's opinion). That exception seeks disallowance of certain disbursements of funds under the June 1, 1868 treaty between the Navajo Tribe and the United States, 15 Stat. 667. Supplemental exception 9 contains ten sections, each of which disputes specific expenditures listed in a report prepared by the General Accounting Office.[15] The challenged disbursements include those

14. The defendant's trust obligations toward tribal timber have been found to be particularly strict, to be established by law, and to require no proof of their existence. *Blackfeet & Gros Ventre Tribes, supra*, 32 Ind.Cl.Comm. at 77–81.

15. Defendant also seeks review of the trial judge's rulings with respect to certain of these subsections of supplementary exception 9. Except insofar as our discussion in this Part VI or the next Part VII of our opinion may deal with those requests for review, we leave the trial judge's opinion unscrutinized at this time.

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which the Tribe alleges were not made for purposes stipulated in the treaty, were for inferior or unsuitable goods, or were not for the benefit of the Navajos. We affirm the trial judge's denial (in Part CX of his opinion) of defendant's motion to dismiss supplementary exception 9.

The disbursements which plaintiff seeks to disallow in this exception were made by the Government in an attempt to fulfill partially its obligations under the 1868 treaty. "In carrying out its treaty obligations with the Indian Tribes, the Government * * * [is] judged by the most exacting fiduciary standards." *Seminole Nation, supra*, 316 U.S. at 296–97, 62 S.Ct. at 1049, 1054, 86 L.Ed. 1480; *United States v. Mason*, 412 U.S. 391, 398, 93 S.Ct. 2202, 2207, 37 L.Ed.2d 22 (1973); *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322. This fiduciary relationship creates a duty on the part of the United States, as trustee, to account for its performance of treaty obligations. *Sioux Tribe of Indians, supra*, 105 Ct.Cl. at 802, 64 F.Supp. at 331. *Ottawa-Chippewa Tribe v. United States*, 35 Ind.Cl. Comm. 385, 405 (1975); *Blackfeet & Gros Ventre Tribes, supra*, 32 Ind.Cl.Comm. at 85.

Defendant contends nevertheless that plaintiff is entitled only to recover shortages in the 1868 treaty obligations in a breach of contract action, and cannot have an accounting, or recover in an accounting for, those expenditures from the treaty fund which are shown to be improper, so long as total treaty obligations are met. This argument is based on a number of cases in which this court and the Indian Claims Commission stated that the Government's failure to meet treaty provisions is a breach of contractual obligations rather than a breach of trust. *United States v. Muscalero Apache Tribe*, 207 Ct.Cl. 369, 408–09, 518 F.2d 1309, 1333 (1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *Confederated Salish & Kootenia Tribes v. United States*, 175 Ct.Cl. 451, 454–55, *cert. denied*, 385 U.S. 921, 87 S.Ct. 228, 17 L.Ed.2d 145 (1966); *Te-Moak Bands v. United States*, 31 Ind.Cl.Comm. 427, 540–42 (1973). This language occurred, however, in the context of rejection of claims for interest, which was available only on money in trust funds, as compared to money set aside to fulfill treaty obligations. *See, e. g. Te-Moak, supra*, 31 Ind.Cl.Comm. at 540–42.

[9] In *Ottawa-Chippewa, supra*, the Commission was faced with an argument very similar to that made by defendant in this case. There, the Government argued that it had no duty to account for certain questioned treaty expenditures since plaintiff's claim was for breach of contract rather than equitable accounting. 35 Ind.Cl. Comm. at 404. Defendant relied on *Te-Moak* as its authority. The Commission refused to interpret the language in *Te-Moak*, regarding the treatment of shortages in treaty payments as breaches of contractual obligations, to mean that the United States did not have a duty "to make a fiduciary's accounting for its performance of treaty obligations * * *." *Id.* at 405. In rejecting defendant's argument, the Commission relied on the language in *Seminole Nation*, stating that when it is "carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party." 316 U.S. at 296, 62 S.Ct. at 1054. Rather, the Government's conduct must be judged by high fiduciary standards. *Id.* at 297, 62 S.Ct. at 1054. Contracts such as treaties should be scrutinized to determine whether these fiduciary standards were met. *Ottawa-Chippewa, supra*, 35 Ind.Cl.Comm. at 405. The Commission found that the claim in *Ottawa-Chippewa* for recovery of amounts improperly expended under the applicable treaty was a demand for an accounting, and that no other remedy would be responsive to the claim. *Id.* at 406. We agree with the Commission's analysis in *Ottawa-Chippewa*, and apply it to this case.

[10] Here, as in *Ottawa-Chippewa*, the Tribe has disputed certain disbursements of Navajo funds on the grounds that they were improperly expended, and were not used for the benefit of the Navajos. The

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exceptions are related to trust accounting, not only to breach of contract, and we agree with the Commission that a remedy involving a fiduciary accounting is responsive to such claims. In its use of treaty funds, the Government is subject to fiduciary accounting principles, regardless of whether shortages in treaty funds may also be termed contractual breaches.

[11] Where the Government, acting as a fiduciary, has improperly charged expenses to the Indians when they actually benefited the Government or other third parties, or has failed to expend funds appropriated for the benefit of the Indians in the manner provided for by treaty, these amounts are properly excepted to, and may be recovered by an Indian tribe. *See, e. g., Rogue River Tribe of Indians v. United States*, 105 Ct.Cl. 495, 550, 552, 64 F.Supp. 339, 343–44 (1946); *Seminole Nation v. United States*, 102 Ct.Cl. 565, 629–31, *cert. denied*, 325 U.S. 719, 66 S.Ct. 24, 90 L.Ed. 426 (1945). However, plaintiff can recover only for improper treaty expenditures to the extent that they exceed any offsets to which defendant is entitled. *See, Rogue River, supra*, 105 Ct.Cl. at 552, 64 F.Supp. at 343–44. *See also*, 25 U.S.C. § 70a. Defendant will therefore have the opportunity to prove that it made sufficient proper expenditures to cancel out any improper charges, and thus that its treaty obligations were fulfilled even though certain expenditures are disallowed. This provision for offsets will prevent the kind of double recovery defendant predicts will occur if supplementary exception 9 is not dismissed.

Defendant's main concern seems to arise from its apprehension that the Indians will somehow receive a double recovery for the challenged disbursements, since various non-accounting claims in other dockets of the Navajo cases [16] also raise issues relating to the 1868 treaty. In order to prevent potential multiple recoveries, defendant asks that we consolidate the claim presented by supplementary exception 9 with docket No. 229 in which plaintiff seeks to recover additional compensation for cessions of land under the 1868 treaty. It is said that this is necessary because the obligations of the treaty were the consideration for plaintiff's land cessions.[17] According to defendant, proper expenditures may be deducted from the fair market value of plaintiff's lands in determining any additional award constituting fair consideration for the ceded lands, but improper expenditures may not be deducted. The Government also asserts that plaintiff is attempting to claim that the now challenged expenditures are not properly to be considered in docket No. 229 (thereby precluding a deduction from the value of the ceded lands) and is also seeking at the same time to obtain a recovery in this docket No. 69 for the alleged failure to fulfill treaty obligations—thus obtaining the effect of a multiple recovery.

We are faced with a situation where there are several separate, but potentially overlapping dockets, all relating generally to claims by the Navajo Tribe against the United States. In these circumstances, defendant might have a legitimate concern about double recovery, except for one significant factor. A single trial judge will hear all of these related dockets, and will be able, where necessary, to take appropriate

16. This docket is composed of the accounting claims from docket Nos. 69, 299 and 353. These claims were consolidated in *Navajo Tribe v. United States*, 31 Ind.Cl.Comm. 40, 59 (1973), and separated from docket 69's non-accounting claims in *Navajo Tribe v. United States*, 35 Ind.Cl.Comm. 305, 311 (1975). In addition, there is now pending before the court, docket No. 229. Docket No. 69 (claims 1 6, 8), containing the non accounting claims of the original docket No. 69 was dismissed by the court in *Navajo Tribe, supra*, 220 Ct.Cl. —, 601 F.2d 536.

17. Plaintiff disputes defendant's position that the *sole* consideration for defendant's payments under the 1868 treaty was cession of plaintiff's aboriginal lands. Plaintiff argues that this issue may be decided in its favor, in which case consolidation would not be appropriate, since docket No. 229 deals only with consideration for land cessions under the 1868 treaty, not with fulfillment of 1868 treaty obligations generally, as supplementary exception 9. *See, Saginaw Chippewa Indian Tribe of Michigan v. United States*, 30 Ind.Cl.Comm. 295, 305–06 (1973).

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steps such as setoffs to avoid any double recovery which might otherwise occur. The trial judge is clearly aware of defendant's concern, as evidenced by his opinion now under review, in which he states several times that double recovery will not occur as a result of any possible overlaps in pleadings. We believe that the trial judge will have no difficulty preventing plaintiff from recovering more than once for any improper expenditures. We therefore reject defendant's request for consolidation, at least at this stage of the proceedings, because the expenditures questioned by supplementary exception 9 are properly part of the consolidated accounting claims of this docket No. 69, and because we believe the trial judge will be able to avoid double recovery without the necessity of further complicating this case with additional consolidations.[18] The trial judge is free, however, to order consolidation at a later step in the proceedings if he considers that remedy called for by the status of the litigation at the subsequent time.

In connection with its consolidation argument, defendant now contends, in addition, that the exception relates to the dismissed claims in docket No. 69, rather than to the accounting claim in this docket, which was not dismissed, and therefore that supplementary exception 9 must be dismissed under *Navajo Tribe, supra*, 220 Ct.Cl. ——, 601 F.2d 536. We have considered that problem in Part III of this opinion, *supra*, and hold there that an issue in general accounting claim 7 can and may properly fall within the scope of that accounting claim, as opposed to a non-accounting claim dealing with subject matter similar to that encompassed by the accounting claim. Such is the case here, where supplementary exception 9 is directed specifically at disbursements of tribal funds listed in a GAO accounting report. This report was submitted by defendant in order to comply with plaintiff's request for an accounting under claim 7 and the other accounting claims in the dockets. The exception, as an exception to certain treasy expenditures listed in that accounting report, relates to claim 7, which is an independent and timely filed request for a full equitable accounting of defendant's management of plaintiff's trust property and money. Claim 7 therefore gives this court jurisdiction over matters coming within the scope of the accounting, including this exception. To the extent that there is any overlap of claim 7 and claims 4, 5 and 6, they may be considered alternate pleadings, and voluntary dismissal of some does not require dismissal of the others.[19]

VII

In the preceding Part VI of this opinion, we denied defendant's request that we dismiss all of supplementary exception 9. In addition to this request for a blanket dismissal, defendant has asked us to review certain segments of that exception questioning some specific expenditures. We are concerned here with an exception to disbursements totalling $1,504,539.57, appropriated for educational purposes.[20] Plain-

18. In so deciding, we have considered and rejected defendant's argument that consolidation is proper because the parties have presented substantial evidence in docket No. 229 relating to the propriety of expenditures made to fulfill 1868 treaty obligations. In a complex and inter related case such as this one, some overlap of factual evidence is inevitable, and is not a sufficient reason to further burden this case with additional changes in form.

19. In *Navajo Tribe v. United States*, 34 Ind.Cl.Comm. 432 (1974), the Indian Claims Commission rejected defendant's argument that a particular exception was not valid because it related to claim 5 of plaintiff's original petition in docket No. 69 (dealing with defendant's actions with regard to plaintiff's resources and tribal property), which was deleted in plaintiff's amended petition, *id.* at 433. The exception related to the accounting report's failure to provide basic information about various sources of revenue. The Commission found that the exception was not affected by the dismissal of claim 5, because it came within the scope of the general accounting claim (claim 7). *Id.* This analysis is equally valid with regard to defendant's argument concerning dismissal of supplementary exception 9.

20. The seventeen appropriations at issue were made in 1913 through 1928, and basically provided that they were for the purpose of carrying out Article VI of the 1868 treaty. Article VI provides that "[i]n order to insure the civiliza-

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tiff excepted to the 1914–1930 expenditures under those appropriations as being too late, poorly conceived and executed, and not for the benefit of the Navajos.

Defendant's motion to dismiss was based primarily on the contention that its obligations under Article VI of the 1868 treaty were limited to a ten year period from 1868 to 1878, and therefore did not extend to the appropriations made in 1913–1928. The trial judge found that the Government's obligations under Article VI were, in fact, limited to the ten years following the 1868 treaty, but declined to dismiss the sub-exception we are now considering (Part CXXIII of trial judge's opinion). He found that plaintiff had a right to know whether any of the funds expended under the 1913–1928 appropriations were applied to non-Navajo beneficiaries in contravention of the appropriation acts, and, even though this was not specifically requested, he construed the exception in that way in order to avoid the need for amendment. We affirm the trial judge's denial of defendant's motion to dismiss this sub-exception.[21]

Under 25 U.S.C. § 70k (1976), claims under the Indian Claims Commission Act had to be submitted before August 13, 1951, or they are barred. Defendant contends that the trial judge's modification of the sub-exception to include a claim under the 1913–1928 appropriations is incorrect because such a claim is barred since it was not timely pleaded under section 70k. In reaching this conclusion, defendant relies on our decision in *Navajo Tribe, supra*, 220 Ct.Cl. ——, 597 F.2d 1367. There, we rejected the Navajo Tribe's attempt to amend its petition in docket No. 229 to state a new land claim relating to the Bosque Redondo reservation because, *inter alia*, neither the original nor the amended petitions referred to the land at issue, or to the statute or executive order creating the reservation. Id. at ——, 597 F.2d at 1370 (1979). The doctrine of relation back could not be used to amend the petition to include the new claim (see Indian Claims Commission Rule 13(c) and Court of Claims Rule 39(c)), and it was barred by the applicable statute of limitations contained in section 70k. *Id.* at ——, 597 F.2d at 1370–71 (1979).

Reliance on that *Navajo Tribe* decision is misplaced, because in that instance there was no nexus between the claims in the original and amended petitions, and the new claim plaintiff attempted to add. Here, however, the questioned exception had a clear relationship to the timely pleaded claim for a general accounting (claim 7), and relation back is proper. *See Menominee Tribe of Indians v. United States*, 102 Ct.Cl. 555, 564 (1945). The seventh claim asks for a true and complete accounting of transactions carried out by defendant, its agents, and employees with regard to plaintiff's property and assets. It specifically alleges that defendant has violated its duties as guardian in that funds appropriated by Congress for plaintiff's use and benefit have come into defendant's possession as a result of the trust relationship, and that defendant has failed to adequately or correctly account "for such * * * disbursals, and disposal of such * * * payments * * *." Thus, the language in claim 7 is more than sufficient to encompass the accounting exception now before us, *see, Navajo Tribe, supra*, 34 Ind.Cl. Comm. at 433, especially in light of the fact that the appropriation figures in question were provided in response to plaintiff's request for an accounting. *See, Blackfeet & Gros Ventre Tribes, supra*, 34 Ind.Cl.Comm.

tion of the Indians entering into this treaty, the necessity of education is admitted * * *, and the United States agrees that [a schoolhouse and teacher shall be provided for every thirty children] * * *. The provisions of this article to continue for not less than ten years."

21. In so holding, we do not need to reach (on the Government's appeal) the issue of whether the obligations created by Article VI extend beyond the ten year period following execution of the treaty, since we agree with the trial judge that plaintiff's sub-exception is proper even in the absence of a treaty obligation to make the 1913–1928 appropriations. However, in Part IX of this opinion, *infra*, we consider the Tribe's appeal from the trial judge's reiteration of his prior ruling that the treaty obligation on education lasted no more than 10 years.

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at 141–42 (accounting reports are part of the pleadings which frame the issues for hearing, and are therefore admissions on which plaintiff can rely).

[12] We agree with the trial judge that, once Congress has appropriated money specifically for plaintiff's benefit, as it did in the 1913–1928 appropriations, the plaintiff has "a legitimate right to know whether any of those appropriations were applied to non-Navajo beneficiaries in contravention of the appropriation acts," Trial Judge's Opinion at 164, and cases cited *supra*, regarding defendant's fiduciary accounting duties, and we hold that the trial judge acted within his discretion in construing the sub-exception to request such an accounting. We find, accordingly, that this exception is properly within the scope of claim 7.[22]

VIII.

The Tribe's requests for review which we consider involve mainly the extent of the Government's obligation to make tribal funds productive either by depositing them in interest-bearing accounts or by investing them fruitfully. Plaintiff challenges a number of the trial judge's holdings in this area (Parts LXXXVIII, LXXXIX, XC of the trial judge's opinion).

[13] The trial judge is correct that it is the settled law of this court that, to recover interest or damages for non-investment, Indians must show statutory, treaty, or contract authority calling for the payment of interest or for investment of tribal funds. *See Mescalero Apache Tribe, supra*, 207 Ct.Cl. at 385, 518 F.2d at 1319; *Cheyenne-Arapaho Tribes, supra*, 206 Ct.Cl. 340, 512 F.2d 1390; *Gila River Pima-Maricopa Indian Community, supra*, 218 Ct.Cl. at —, 586 F.2d at 216–17 (1978). The problem here is the existence or not of such authority for various funds, deposits, and accounts.

A. Plaintiff argues strongly that funds required by law to be deposited in IMPL accounts at 4% interest were wrongfully deposited and held by defendant in other, non-interest bearing accounts (e. g. "IIM", or "IMPL, Agency" accounts). It is also said that certain other tribal funds (not required to be deposited in interest-paying IMPL accounts) were improperly (*i. e.* contrary to law) placed in commercial accounts or totally non-productive deposits, or the interest was paid to the Government (not for the benefit of the Navajos).

The trial judge does not directly address these points and we cannot say that the contentions are frivolous or insubstantial on their face (or as argued to us). But at the same time we are not in a position to resolve these issues, several of which embody factual components. We think therefore that they should be investigated further and plaintiff should be permitted to show, if it can, that such deposits of tribal funds in non-interest bearing or non-fruitful accounts were wrongfully made. To that end we vacate the trial judge's dismissal of supplementary exception 5a (and Part LXXXVIII of his opinion) and remand for further proceedings on that exception.

B. The Navajos' separate point that, in the period before July 1, 1930, the Government had a duty to invest plaintiff's funds in trust has already been rejected (*sub silentio*) in large part in *Mescalero Apache Tribe, supra*, 207 Ct.Cl. 389, 518 F.2d 1309. The 1883 and 1887 statutes on which plaintiff now relies were before the *Mescalero* court but were not accepted as imposing such a duty to invest or make productive.[23] *Id.* The trial judge did not err in following *Mescalero* in this respect.[24]

22. Defendant repeats, in challenging this sub-exception, several of the same contentions we have rejected (in Part VI of this opinion, *supra*) in connection with the main exception. Our discussion in Part VI applies to this sub-exception as well.

23. The writer of this opinion, dissenting in *Mescalero*, discussed these statutes at some length, and thought them applicable, but the majority of the court did not agree.

24. On the other hand, it may very well be that the *Mescalero* court did not consider section 28 of the Act of May 25, 1918, ch. 86, 40 Stat. 561, 591, or the Act of June 24, 1[illegible], ch. 52 Stat. 1037. On remand, th[illegible] and the trial judge may appraise the [illegible] of those pieces of legislation. To that e[illegible] Part LXXXIX of the trial judge's opinion is vacated.

C. The third of the Tribe's "interest" points is that it was entitled, in the period after July 1, 1880, to have the interest earned on its tribal funds placed in interest-bearing accounts or otherwise invested productively. *Mescalero* held that compound interest is not allowable in the absence of statutory permission (which does not exist in this instance) and, on the authority of that decision, we must reject the claim that interest earned on tribal funds should have been deposited, when earned, in interest-bearing accounts. *Id.* at 404, 518 F.2d at 1231.

[14] As for a separate obligation to invest tribal funds productively—whether those funds be earned interest or other tribal funds—the matter is not at all clear at this stage, and does not seem to have been sufficiently canvassed at the trial level. The presentation, based on Congressional enactments, made to us on this point by plaintiff and by the brief amicus curiae is substantial. We think, again, that the problem deserves further consideration, and we remand the issue to the trial judge so that he can reconsider it in the light, not only of *Mescalero*, but also of *Cheyenne-Arapaho* (which was not overruled by *Mescalero*, see *Mitchell v. United States*, 219 Ct.Cl. ——, ——, 591 F.2d 1300, 1306 n. 21 (1979), *rev'd on other grounds*, —— U.S. ——, 100 S.Ct. 1349, 64 L.Ed.2d 607 (1980), and the pertinent legislation which was not rejected in *Mescalero (see supra)*—as well as the relevant facts to be proved. To facilitate this reconsideration, we vacate Parts LXXXIX and XC of the trial judge's opinion to the extent they prevent such reconsideration from taking place.

IX

[15] The trial judge repeated, in passing, his prior holding that the Government's obligation under the 1868 treaty to provide education for the Navajos lasted for no more than 10 years. The Tribe seeks review of this ruling, and though it is not necessary to consider it in order to deal with the particular supplementary exceptions now before us (see Part VII of this opinion, *supra*), we do so because the holding is a dispositive one and may play a significant role in determining the full extent of defendant's fiduciary obligations under the 1868 treaty.

Article VI of the treaty provided as follows:

> ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.
>
> The provisions of this article to continue for not less than ten years.

We agree with the trial judge that, in the absence of very strong materials suggesting the contrary, the second paragraph must be taken literally to mean that the defendant's obligations under the Article were not to continue for more than 10 years. In fact, Congress made ten consecutive payments for Navajo education, beginning in 1871 and ending 1880. The tenth appropriation expressly said: "*For last of ten installments*, for pay of two teachers per sixth Article of treaty of June first, eighteen hundred and sixty-eight, two thousand dollars * * *." Act of May 11, 1880, ch. 85, 21 Stat. 114, 121 (emphasis added). There were no further appropriations for Navajo education until 1913.

Mr. HALL. Whoever is next, please identify yourself for the record, and put your statement into the record also.

Mr. BOYD. Thank you, Mr. Chairman. My name is Thomas Boyd.

We strongly feel that the education claim is the far most important of the claims that are before the U.S. Government, or that has been judged by the U.S. Government.

We feel that because education is recognized by all the Navahos. It is an area where we are most seriously limited by the Government's failure to honor its promises within the treaty of 1868. We hope that a recovery on our claims will help to offset the lack of education opportunities that had handicapped the past generation of the Navaho people.

We strongly feel and are urging this subcommittee that we have our day in court on our important education claim, and we are confident that you people in the Congress intended us to have a fair hearing on the merits of all claims properly pleaded in our original petition.

The bill will give us an opportunity, and will fully protect the Government against the relitigation of any claims already heard or presently pending before the U.S. Claims Court.

Thank you.

Mr. HALL. Thank you very much, sir.

[The statement of Mr. Boyd follows:]

PREPARED STATEMENT ON BEHALF OF NAVAHO NATION

Mr. Chairman: My name is Thomas Boyd. I am the Tribal Councilman from Crystal Chapter and a member of our Claims Committee. I want to emphasize Mr. Gorman's remarks concerning the Government's duty to protect the Navaho Tribe from the unjustified dismissal of its fair and honorable dealings claims. Our second claims attorney's contract was intended to prevent the result of the Court of Claims' decision in 1979. It specifically required both Tribal and Secretarial approval of any "compromise, settlement, or other adjustment" of the claims originally pleaded by our first attorney in 1950. That provision was intended to fulfill the duty imposed on the Secretary of the Interior by 25 U.S.C. § 18a to supervise tribal attorneys and protect the Tribe against their mistakes.

We didn't know in 1969 what our second claims attorney was doing on our claims. He never reported his proposed amendment of our original Petition to the Tribal government. His letter of July 8, 1983, to the Chairman of this Committee indicates that he did not intend to dismiss our "fair and honorable dealings" claims and the Tribe certainly had no intention of dismissing any claims covered by our original Petition. Particularly, we would never have dismissed our claim based on the Government's failure to provide education in accordance with its 1868 promises and Congress later recognition of its special obligation to educate our children. Education is recognized by all Navaho as the area where we are most seriously limited by the Government's failures in honoring its promises. We hope that a recovery on our claims will help to offset the lack of educational opportunities that handicapped past generations of Navaho people.

The Department of Justice attorneys should have asked the Secretary of the Interior to approve the 1969 amendment of our original Petition as an "adjustment" of the claims, dropping all claims based on the Government's failure to deal fairly and honorably with the Tribe. In the case of the reduction of the Jicarilla Apache Tribes' claimed aboriginal area stipulated by its attorney, the Justice Department refused to accept the attorneys' action until the Commissioner of Indian Affairs had approved, as required by the attorney's contract. However, the Jicarilla stipulation was contrary to the Government's interest, while the amendment of our Petition was in the Government's favor. The Navaho Tribe thus suffered the loss of valuable claims because the Government had failed to supervise its attorney's dismissal of claims based on fair and honorable dealings. The Government's present position that it was not required to protect the Tribe's interest under the Claims Commission's ruling in the Jicarilla case is not applicable because our original claims Petition had not made any mistake in claiming lands owned by others. Our second at-

torney now says he was attempting to consolidate our claims and did not intend to dismiss any claims in the Petition. Since a "withdrawal" of claims was ambiguous—it obviously does not suggest a "mistake"—the Department of Justice should have demanded Tribal and Secretarial approval.

Enactment of the bill is needed to reverse the Government's regrettable failure to fulfill its duties under 25 U.S.C. § 81(a) and our attorney's contract. We very much want our day in court on our important education claim, and we are confident that Congress intended us to have a fair hearing on the merits of all claims properly pleaded in our original Petition. The bill will give us that opportunity, and it fully protects the Government against relitigation of any claims already heard or presently pending before the U.S. Claims Court.

Mr. HALL. We will now hear from Mr. Plummer.

Mr. PLUMMER. Thank you very much.

My name is Marshall Plummer. I am a council delegate to the tribal council.

I get a feeling that you are a little bit confused about what we are trying to present here, Mr. Chairman, and I would like to verify that a little bit.

We have had treaties with the U.S. Government. I don't know whether any of you have heard about our plight, but we have been done wrong by the U.S. Government in many ways just because of the treaty that we agreed to back in 1868. One of the agreements was specifically on education. I guess most of you are aware that the Bureau of Indian Affairs is responsible for many of our resources, included forested areas, range management, education, social welfare, et cetera, et cetera. These are all social programs.

Some of the different things that we want heard in the courts are related to these areas. One major one is education. And this is what Mr. Gorman and Mr. Boyd were referring to in their testimony.

Just to give you an idea of what we are talking about, the effects and the consequences of the failure of the Government to provide as to the agreement we made back in 1868, what has happened—just to give you an example of that—first of all, we, as Indian people, have had to adapt ourselves to a foreign lifestyle. I am sure many of you are aware of that, as you heard Mr. Gorman speak.

Mr. Gorman has had limited education, whereas I, being the youngest member here representing the tribal council, had gone to college and can speak probably better English than he can, but probably have the same concepts in my head. It is difficult to adapt to a foreign lifestyle.

What has resulted is that the Government's failure to provide as they stated so in the agreement in 1868 regarding education, what has happened is that there have been many social factors, native social factors, that have surfaced. Today we are facing 85 percent unemployment on the reservation—not our fault. Every year, the Congress appropriates $31 million to us specifically for welfare programs. These people out there have a limited education. They just don't have the opportunities.

These are some of the things that we want heard in the courts. But based on the decision that was rendered in 1979, we did not get that opportunity. This is all we are asking for, that these cases be brought back so that they can be judged based upon their merits, not on some technicality. This is what we are here for, and we ask for your assistance.

We feel that, if we are given the opportunity, we won't have the same situation 115 years from now as it is now. We signed an agreement 115 years ago, and look at us. We are dependent upon the Federal Government, and that is not what we want. We want to become self-sufficient and not have to come to Washington to argue points of this sort. So we are asking for your assistance to give us that opportunity for the cases to be heard in the courts.

I would also like to invite each one of you to our reservation, to visit with us, to see the plight of our people.

Thank you very much.

[The statement of Mr. Plummer follows:]

PREPARED STATEMENT ON BEHALF OF NAVAHO NATION

Mr. Chairman: My name is Marshall Plummer. I am the Tribal Councilman from Coyote Canyon Chapter and the youngest member of the Claims Committee.

Mr. Gorman's statement has covered the terms and effect of the bill, and I will not elaborate on his remarks. I want to focus the Committee's attention on the feelings of the Navaho people concerning education. Throughout our Reservation there has been a sense of betrayal and loss because the Government failed to provide education for our people as its 1868 agreement promised.

We are fully aware of the fact that under Article VI of the 1868 treaty the Government promised to give us the "advantages and benefits" [1] of "civilization" [2] and an "English education." [3] At the same time, the Government took our land, and our leaders recognized that we could survive as a people only if we were able to achieve the benefits of "civilization" because we no longer had our original land base. We, therefore, readily agreed to the Government's terms in Article VI of the Treaty. Almost immediately after the Treaty was signed, our ancestors began to petition the United States Government to live up to its promises by providing educational facilities and teachers for all of our children. Those pleas fell on deaf ears in Washington, where under the United States own laws we were not allowed to seek judicial relief until passage of the Indian Claims Commission Act in 1946. The Navaho Tribe promptly filed a claim under Section 2 of that Act (25 U.S.C. § 70a) based in part on the Government's failure to deal fairly and honorably with the Tribe in meeting its educational commitments. Despite the contentions of the Justice Department that some parts of our claims survive the 1969 "withdrawal," the fact remains that our "fair and honorable dealings" education claim will never be heard on its merits without legislation such as H.R. 3533.

We were appalled to learn that the Court of Claims dismissed our "fair and honorable dealings" claims because of the unauthorized action of our attorney. This is a clear case of the Government's taking advantage of our attorney's mistake in the face of its duty under 25 U.S.C. § 81a to protect us against such unwarranted action. In opposing this bill, the government is still taking advantage of the Navaho Tribe.

June 1 of this year marked the One Hundred Fifteenth anniversary of the Navaho Treaty. Because of a technicality and the Government's own failure to monitor the attorneys' contract it had approved, we are still waiting for our first day in court on the merits of our claim that it did not honor its side of the bargain. I ask the committee to approve the bill.

Mr. HALL. Where is your reservation located? Where is the headquarters of it? Where do you live?

Mr. PLUMMER. Window Rock, Ariz., is the headquarters, and it extends into Arizona and New Mexico and Utah.

Mr. HALL. How many people are in that area?

Mr. PLUMMER. Approximately 160,000 people.

Mr. HALL. And you say there is 75 percent unemployment at this time?

Mr. PLUMMER. Eighty-five percent.

[1] Exhibit A, p. 45a.
[2] Exhibit A, p. 44a.
[3] Exhibit A, p. 44a.

Mr. HALL. Eighty-five percent at this time.

Mr. PLUMMER. Yes; and the welfare roll is $31 million right now.

Mr. HALL. The 15 percent who are employed, are they employed on the reservation or off?

Mr. PLUMMER. On the reservation, generally. There are some border towns such as Gallup, Farmington, Flagstaff, and areas like that, where a limited amount of our people are employed. But a lot of our people who are employed are employed by Government programs that put out these social programs.

Mr. HALL. The 85 percent who are not employed, what do they do?

Mr. PLUMMER. What can they do?

Mr. HALL. Are they educated at all? Do they have any type of education or schooling?

Mr. PLUMMER. Right now, the average level of education on the Navaho Reservation is about 9.5.

Mr. HALL. When you say the level of education, are you speaking of high school or grade school.

Mr. PLUMMER. The grade level is 9.5, which is a freshman in high school, 9th grade.

Mr. HALL. All right.

We will now hear from the gentleman representing the Attorney General, Mr. Liotta.

We will ask questions of all of you after we have finished with the other testimony.

Bill, thank you for coming. I know you have a schedule to meet. We appreciate your being here.

TESTIMONY OF HON. ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JAMES BROOKSHIRE, CHIEF OF THE INDIAN CLAIMS SECTION, DEPARTMENT OF JUSTICE

Mr. LIOTTA. Mr. Chairman, I would like to introduce Mr. Jim Brookshire, the Chief of our Indian Claims section, and, with your permission, he will stay here.

Mr. HALL. Yes.

Mr. LIOTTA. Mr. Chairman, also with your permission, I have a statement and I have a summary of the statement, and, if I may, I would submit the statement for the record.

Mr. HALL. It will be made a part of the record.

Mr. LIOTTA. Mr. Chairman, members of the committee, it is a pleasure to appear before you and speak on H.R. 3533, and I thank you for the opportunity.

The Department of Justice opposes passage of H.R. 3533, which would confer jurisdiction on the U.S. Claims Court to hear certain claims of the Navaho Indian Tribe, previously filed and voluntarily withdrawn in October 1969 by counsel for the tribe.

In 1979, the Court of Claims ruled the withdrawal valid that was made without the knowledge of the tribe or the Secretary of the Interior. The Department also opposed passage of a legislative predecessor of H.R. 3533, which I believe was H.R. 4445, which was not favorably acted upon.

The Department then believed that Congress should not reverse the clear holding of the court and set a precedent for reviving claims for which the statute of limitations has long ago run. We opposed H.R. 3533 for the same reasons.

Moreover, the language of H.R. 3533 is even more general and imprecise than that contained in the prior bill. Since it allows resubmission of withdrawn claims which have not been considered or decided on their merits, and which are no longer pending before the claims court, and have not been previously determined on the merits by the U.S. Court of Claims, this circular language, I submit, invites further confusion by merely referencing prior pleadings and hearings in this very complex and protracted case.

That is the completion of my summary, Mr. Chairman and members of the committee. I would be pleased to answer any questions to the best of my ability.

[The statement of Mr. Liotta follows:]

PREPARED STATEMENT OF ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

I am Anthony C. Liotta, Deputy Assistant Attorney General for the Land and Natural Resources Division, of the Department of Justice. Thank you for giving the Department this opportunity to present our views concerning H.R. 3533, which would confer jurisdiction on the United States Claims Court to hear claims of the Navajo Tribe of Indians which were previously filed with the Indian Claims Commission and voluntarily withdrawn in October, 1969 by the Tribe's counsel of record, and which have not been considered or decided on their merits.

As you may be aware, I testified before the Senate Select Committee on Indian Affairs in November, 1981 in opposition to a similar bill (S. 1613), which was eventually rejected by that Committee. A copy of my statement on that occasion is attached to my present statement for your reference. I have also attached to today's statement, letters from former Assistant Attorney General, Carol E. Dinkins and Assistant Attorney General Robert A. McConnell to Congressman James V. Hansen, in response to questions raised by the Congressman and Counsel for the Tribe in regard to the subject of this legislation. Those letters explain in detail the Department's reasons for opposing passage of H.R. 3533 and its companion bill.

The Department of Justice is opposed to passage of H.R. 3533 for three basic reasons. First we believe that counsel for litigants in Indian Claims cases, as with all cases, must

be recognized as having the authority to conduct the prosecution of a claim, and that the subject claims were duly withdrawn by counsel for the Navajo Tribe. Second, the Tribe has been and is being given a full and fair opportunity to present its claims under the Act of 1946, to dispute the validity of the actions of its counsel, and to litigate all remaining claims under remaining counts of its various petitions. Finally, the Department believes that the Congress should not directly reverse the decisions and orders of the Claims Court regarding claims voluntarily withdrawn, and allow by special exception the litigation of claims which would otherwise be barred by the operation of a statute of limitation.

The apparent purpose of this bill, as it was with S. 1613, is to allow the refiling of claims which were asserted in the Tribe's petition in Docket No. 69 (claims 1 through 6 and 8), originally filed on July 11, 1950. Those claims were voluntarily withdrawn nineteen years later, when the Tribe's counsel filed an amended petition asserting only the seventh claim of the original petition. Since then, his action has been the subject of extensive examination and second-guessing. In 1979, the Court of Claims ruled that the attorney had authority under his contract to withdraw the claims, notwithstanding any lack of knowledge or consent by the Tribe or the Secretary of the Interior. Navajo Tribe of Indians v. United States, 601 F.2d 536, 539 (Ct. Cl. 1979). The Court found that

his action was "a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney."

The trial judge's initial decision was clarified in an order of September 28, 1979, which was sustained by the Claims Court in a decision finding that if the surviving seventh claim did not include certain claims, those claims may not be reasserted because of the statute of limitations. I have attached a copy of the trial judge's clarification and would be happy to furnish copies of the opinions of the Court of Claims to the Committee, if you desire.

The Department's second concern is that this bill would expressly overrule a decision which was arrived at after a fair and full hearing by a court of competent jurisdiction. As is evident from the extended period over which the issue of claims withdrawal was considered and by the number of decisions and clarifications which were precipitated by that consideration, this Tribe has received its due process -- to provide it with additional opportunities will be to delay consideration of the claims of others which are still to be considered. All claims which they have properly prosecuted under the Act of 1946 have either been legally withdrawn, settled, considered, decided, or are still pending on an extremely complex and detailed docket. The bill would expressly contradict an unequivocal finding of the trial judge and the Court of Claims by declaring that prior claims "were withdrawn without required

approval by the Tribe and the Secretary of the Interior," and would severely complicate the pleadings in a case already characterized as "byzantine" by the Court. Since the bill does not specify what specific claims would be allowed and simply refers back to prior petitions and hearings, it invites a whole new layer of disputes over the scope of the bill itself . . a dispute which would hardly serve the interests of justice and the public.

Finally, the Department believes that the passage of H.R. 3533 would set an unfortunate precedent, and could invite similar future petitions for relief from the operation of the statute of limitations for claims under the Act of 1946. Since the right of the Tribe to present additional claims under the Act has been litigated and denied, the passage of the bill would constitute the granting of a special exception to the operation of the Act's statute of limitation -- thus frustrating a major purpose of the Act and encouraging similar untimely requests for private relief on behalf of others whose claims have been withheld or denied in similar circumstances or who may argue some other justification for an exception. A similar incident, involving special relief from the operation of the defense of res judicata and allowing the relitigation of a claim by the Sioux Nation, has been followed by the allowance of three more exceptions to other tribes. Sioux Nation v. United States,

220 Ct. C. 442 (1979), aff'd 448 U.S. 371 (1980). I have attached a list of those cases to my statement.

In conclusion, the Department is opposed to H.R. 3533, because it expressly reverses the lawful actions of counsel for the Tribe, as fully and fairly considered and sustained by a court of competent jurisdiction, because its language is vague and will only serve to hinder the fair and prompt resolution of the underlying dispute, and because it sets an unfortunate precedent which may well lead to similar requests for relief from the operation of a fair and reasonable statute of limitations.

Department of Justice

ANTHONY C. LIOTTA
DEPUTY ASSISTANT ATTORNEY GENERAL
LAND & NATURAL RESOURCES DIVISION

BEFORE

THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

CLAIMS OF NAVAJO INDIANS/S. 1613

ON

NOVEMBER 18, 1981

I am Anthony C. Liotta, Deputy Assistant Attorney General for the Land and Natural Resources Division. As the Committee is aware, S. 1613 would confer jurisdiction on the United States Court of Claims to hear claims of the Navajo Tribe of Indians which were previously filed with the Indian Claims Commission under Section 2 of the Act of August 13, 1946 (60 Stat. 1050, 25 U.S.C. 70a) and dismissed by withdrawal in October, 1969, by the attorney of record for the Navajo Tribe.*/ The claims that were withdrawn were Claims 1 through 6 and 8 in Docket No. 69.

In the bill the claims are rather generally represented to be:

> * * * claims that (1) Navajo Reservation lands were taken by the United States or disposed of to others without payment of adequate compensation; (2) the United States failed to fulfill Article 6 of the Treaty of June 1, 1868, 15 Stat. 667, and to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946, and (3) that the United States mismanaged the lands and resources of the tribe: * * *

We wish to point out at the outset that the description of the claims in S. 1613 is entirely too broad and imprecise. Nevertheless, each category of claims warrants attention since

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*/ In 1979 the Court of Claims ruled that the Tribe's attorney possessed authority to withdraw the claims in question and stated that the "decision to withdraw . . . was a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney." See Navajo Tribe of Indians v. United States, 601 F.2d 536, 539 (Ct. Cl. 1979).

enactment of this legislation would have very serious consequences with respect to the conduct of ongoing litigation in several dockets.

As to the first category of claims, it is the Government's position that the Navajo Tribe has not asserted any claim for the taking of reservation lands in Claims 1 through 6 and 8. There is no good reason to grant the Navajo Tribe jurisdiction to file any such claim now, more than thirty years after the jurisdictional bar of Section 12 of the Indian Claims Commission Act. (Act of August 13, 1946, 60 Stat. 1049, 1052, 25 U.S.C. 70k).

The second category of claims may contain two matters. The first is a claim for the failure of the Government to fulfill Article VI of the Treaty of June 1, 1868 (15 Stat. 667). This claim for the nonfulfillment of Article VI of the 1868 Treaty is currently being litigated under Claim 7 of Docket No. 69, in the Court of Claims. The second of these two claims is the alleged failure of the Government to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946. If this is meant to be a claim based on some obligation beyond the terms of the 1868 Treaty, then the Government submits that such a claim has never been previously presented. Furthermore, if this second claim is based on some general obligation to provide adequate educational facilities, instructors and instruction, then to grant jurisdiction to the Court of Claims would be to give the Court jurisdiction to entertain a claim that is not available to other Indian claimants. This was the holding in Gila River Indian Community v. United

States, 190 Ct. Cl. 790, 801 (1970).

The third category of claims include allegations that the Government mismanaged the lands and resources of the Navajo Tribe. Claims for mismanagement of lands and resources are already being litigated in Claim 7 of Docket No. 69, and in Docket Nos. 299 and 353.

In conclusion, it is the Department's position that enactment of S. 1613 would create confusion and prolong litigation on claims that are already before the Court of Claims. Moreover, to the extent that these claims are included in Claim 7, it should be pointed out that the United States has relied on the dismissal of Claims 1 through 6 and 8 and has framed its litigation strategy accordingly. Reopening these issues would not only duplicate prior litigation, it would undercut the Government's position. Consequently, we strongly believe that there is no justification whatsoever for enacting S. 1613.

Furthermore, enactment of this bill would be contrary to the policy stated in Section 12 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1052, 25 U.S.C. 70k) which provides that all tribal claims which arose prior to August 13, 1946, had to be filed within five years and that no claim not so presented "may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress." We have repeatedly stated that the erosion of this policy will lead to many applications for special jurisdictional acts to allow the litigation of forgotten claims and the relitigation of previously adjudicated claims. We therefore urge the Committee not to sanction the further erosion of this policy.

6-14-83

Honorable James V. Hansen
House of Representatives
Washington, D.C. 20515

Dear Congressman Hansen:

Re: Navajo Tribe v. United States, Docket Nos. 69 and 299, before the United States Claims Court

Your letter of May 18, 1983 requests explanation of the Department's actions in seeking dismissal of Navajo Tribal Claims 1-6 and 8 in Docket No. 69 after such claims had been voluntarily withdrawn by plaintiff's counsel without the apparent knowledge or approval of the Navajo Tribal Council or the Secretary of Interior. You suggest that such action may be inconsistent with a position taken by Department counsel in an earlier case (Jicarilla Apache Tribe v. United States, Docket No. 22-A), and ask whether such earlier action should not serve as a precedent to allow such claims to be reinstated by legislative action. You further ask whether the dismissed claims 1-6 and 8 are still pending in current dockets before the United States Claims Court. Briefly summarized, the facts are as follows:

The original petition consisting of claims 1 through 8 was timely filed in Docket No. 69. Thereafter, and before the filing deadline of August 13, 1946, plaintiff filed three additional dockets, numbered 229, 299 and 353. Docket No. 229 was an aboriginal land claim duplicating allegations pled in Claims 1 and 2 of Docket No. 69. Docket No. 353 was an accounting claim for mismanagement and breach of fiduciary duty regarding oil and gas resources. Docket No. 299 is an accounting claim for mismanagement and breach of fiduciary duty regarding all other resources. These resource claims had been generally alleged by claim 7 of Docket No. 69. Accordingly, these accounting claims were consolidated for trial.

On October 1, 1969, former Navajo counsel, Harold Mott, filed a First Amended Petition which withdrew from consideration non-accounting claims 1-6 and 8 of Docket No. 69. In 1974 a subsequent Navajo counsel, William Schaab, filed a Second Amended Petition in Docket No. 69 which purported to reformulate and restore non-accounting claims 1-6 and 8 to the case. The Commission allowed this amendment on the ground that it was based on facts contained on claim 7 of Docket No. 69 which had not been withdrawn, and otherwise concluded that the attempted withdrawal by Mott had not been effective because the attorney contract then in effect required tribal approval for any "adjustment" of the claims. (35 Ind.Cl.Comm. 305, 307, January 23, 1975).

On June 3, 1976, Department counsel filed a motion to dismiss claims 1-6 and 8 of Docket No. 69 on the ground that the "reformulation" by Schaab happened after the statute of limitations (25 U.S.C. 70K) had run. The Commission transferred the cases to the Court of Claims (under P.L. No. 94-465, 90 Stat. 1990 (1976)) without ruling on this motion. The cases were assigned to Trial Judge Bernhardt who reaffirmed the Commission's earlier ruling that said claims related back to the original petition. On appeal the Court of Claims reversed this ruling and dismissed these claims. (220 Ct.Cl. 360 (1979), 601 F.2d 536 (1979)).

The Court ruled on appeal that the withdrawal of claims 1-6 and 8 in Docket No. 69 by former Navajo counsel Mott did not require tribal or Secretarial knowledge or approval. The Court construed the relevant paragraph of the attorney's contract (i.e., par. 6, Compromises and Settlements) as requiring:

> * * * tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, i.e., the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract "to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract."

29-680 O—84——12

> Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action.

Consequently, the Court held there was nothing before the Commission to which the 2nd amended petition in 1975 could "relate back", and the situation stood as if the withdrawn claims had never been filed. The Commission thus lacked jurisdiction to hear them. (Pages 366-367 of the Court's opinion.)

We agree with the above conclusions and the result. We do not find this view inconsistent with the Commission's interpretation of the attorney's contract in the Jicarilla Apache case. There, the Commission had ordered a consolidated hearing of the aboriginal land claims of certain Pueblo Tribes in the areas and to the extent these claims overlapped the similar claims of the Jicarilla Apache. The Commission's order of consolidation further provided that any petitioner who would disclaim any interest in the area claimed by the Jicarilla could avoid the consolidated hearing of the Jicarilla Apache land claims. Thereafter, five stipulations were executed between the Jicarilla Apache counsel and the separate counsel of five Pueblo tribes. Department counsel perceived this action as an "adjustment of claims" requiring approval of the tribe and the Secretary. The Commission recognized the validity of the contention that such approval should be required where historical boundaries were being adjusted in aboriginal land claims (12 Ind.Cl.Comm. 439, 476-477 (1963)). The Commission found, however, that there was absolutely no evidence of historical overlap of bordering claims, but that Jicarillo Apache counsel by "mistake and oversight" had erroneously claimed Pueblo lands. The stipulations which served to correct the mistake did not constitute an arbitration or compromise of a controversy between them since none had ever existed and there was only a mistake of pleading. The Commission concluded (Id., p. 478):

> * * *This correction of an error in pleading made by counsel's inadvertence in failing to exclude lands claimed by subject Pueblos is not difficult to distinguish from a situation where a historic boundary dispute between adverse Indian groups or tribes is sought to be settled by arbitration and compromise. Here there was a mistake in the pleading of the description of Jicarilla Apache's claimed lands and its correction.

We have accepted the Commission's correction of our mistaken perception of the Jicarilla Apache transactions and see no precedent which would support legislative revival of the dismissed Navajo claims.

It is our view that the dismissed claims of any substance are the subject of claim 7 in Docket 69 or in Docket Nos. 229, 299 and 353, either presently before the Claims Court or for which judgment has been entered.

Claims 1 and 2 sought a declaration that the Treaty of June 1, 1868 was invalid and a judgment for the fair market value of Navajo aboriginal land. These claims were the subject of a judgment in Docket No. 229. A judgment of $14,800,000.00 was awarded to the Navajo Tribe on September 18, 1981 for the fair market value of their aboriginal lands.

Claim 3 complains of the adequacy of the agricultural land provided under the 1963 treaty and contends that the government is liable for the damage which allegedly occurred from overgrazing. The management of all lands on the reservation is the subject of inquiry under claim 7 of Docket No. 69.

Claim 4, subtitled "Education; Schools," alleged that the United States failed to ensure the civilization and education of the Navajos under the 1868 treaty. Trial Judge Bernhardt ruled that the obligation to provide education extended for 10 years only. The Court of Claims affirmed this view. (224 Ct. Cl. 171, 197-199 (1980); 624 F.2d 981, 995-996 (1980)).

Claim 5 alleges a breach of fiduciary duties by the United States with respect to the Tribe's natural resources and other tribal property. These claims are also the subject of claim 7 in Docket No. 69 and in Docket Nos. 299 and 353. Oil and gas mismanagement claims, as well as claims for wrongful disbursement and handling of tribal funds, and the failure to fulfill Article 8 provisions of the 1868 Treaty, were the subject of a judgment award of $22,000,000.00 to the Navajo Tribe in Docket No. 353 on June 8, 1982. Similar claims for mismanagement of copper, vanadium, uranium, sand, rock and gravel resources were tried during February-March 1983 and are pending on briefs to be filed before the Claims Court in Docket Nos. 69 and 299. Other resource and property claims were scheduled for trial in these dockets by the Trial Judge's order of March 24, 1982. Trials have been thus set into 1985 (e.g., timber and sawmill claims - October 24, 1983; coal, water, rights-of-way, mission sites, etc. - May 15, 1984; and grazing lands - January 10, 1985).

Claim 6 alleges that miscellaneous facilities provided under the 1868 Treaty were inadequate and delayed. To the extent that such facilities were maladministered or mismanaged, the claims are pending under claim 7 of Docket No. 69.

Claim 8 alleges breach of an agreement in 1886 to return Navajo aboriginal homelands in return for services by individual Navajos as scouts and guides during the Apache war. Claims of individuals are not justiciable under the Indian Claims Commission Act. The claim for aboriginal lands was the subject of the judgment in Docket No. 229 as noted above.

It is the position of the Department that the Navajo Tribe has not been the victim of any injustice and in the dismissal of the claims that no legislative remedy is required.

Sincerely,

Carol E. Dinkins
Assistant Attorney General
Land and Natural Resources Division

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

Honorable James V. Hansen
House of Representatives
Washington, D. C. 20515

Dear Congressman Hansen:

Thank you for the opportunity to present our comments on Mr. Schaab's letter of July 12, 1983 and S. 1196. We did not have a copy of S. 1196 at the time our letter of June 14, 1983 was being prepared. We accordingly directed our remarks to specific questions posed in your letter of May 18, 1983. Although we agree that tribes must have a fair opportunity to present their claims, we remain opposed to the bill and appreciate this further opportunity to supplement and elaborate upon our position.

In sum, we oppose the bill on four grounds. First, the legislation would define the details of a particular attorney-client relationship. Second, we view the relief as unnecessary. Third, the bill is ambiguous. Fourth, legislation of the sort proposed portends new requests for jurisdictional authority by Indian tribes who have become dissatisfied with results obtained under the Indian Claims Commission Act (60 Stat. 1049, 25 U.S.C. § 70, et seq.) (hereafter, the Act.)

First, the proposed language of S. 1196 plainly reverses the Court of Claims holding that a voluntary dismissal of certain tribal claims by tribal counsel was proper and binding on the client, even though without the prior knowledge and consent of the Tribe and the Secretary of Interior. Navajo Tribe v. United States, 220 Ct.Cl. 360, 601 F.2d 536 (1979). Language in S. 1196 which concludes that claims were withdrawn without the "required" approval of the Tribe and the Secretary accomplishes this result. As we said in our letter of June 14, 1983, we believe that the Court of Claims was correct in supporting the validity and propriety of the tribal attorney's action in that case. An ever-present legislative "requirement" of knowledge and approval of the Tribe and the Secretary would impose serious restrictions on tribal counsel's actions during the normal course of litigation, making it virtually impossible for that counsel to act with dispatch and efficiency in the handling of complex Indian claims. Courts and litigants must be able to rely and

act upon representations of counsel in litigation. In their capacity as defense attorneys, this Department's lawyers would act at their peril to rely upon tribal counsel's representations without assurance in each instance that approval had been provided. Inordinate delays in the disposition of these suits would be the inevitable result.

Present counsel also argues that the Department of Justice has, or had, some fiduciary duty under 25 U.S.C. § 81a "to protect Indian tribes against the unauthorized or imprudent actions of their attorneys." Letter of May 31, 1983, at 4. It is the breach of this duty which is said to justify the proposed legislation. Id. This proviso would alter the role of defense lawyers and judges involved in adversary proceedings under the Act by adding an overriding obligation of assuring that tribal counsel's strategy, tactics, and actions were not only authorized but also prudent and, presumably, likely to succeed. We do not understand that to be the role which Congress intended for this Department when it established a tribunal for the litigation of Indian claims.

Mr. Schaab's July 13, 1983 letter principally focuses upon the Court of Claims dismissal of "fair and honorable dealings claims" allegedly contained in Clauses 1-6, and 8 of the original petition in Docket No. 69. He reasons that the dismissal of those claims precludes any further consideration of them by the Court of Claims. As we discuss in some detail below, most of such claims are clearly not precluded. Mr. Schaab's proposition, or one very similar to it, was proffered by the government itself to the Court of Claims in Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 181, 624 F.2d 981, 986 (1980). In the 1980 opinion, the Court described Claim 7 as "an all-inclusive claim that asked the Government to account generally and properly for its handling of the Tribe's monies or property over which the Government had exercised control or supervision." Id. Plaintiff's exception to the government's accounting report, we argued, sought to reassert claims which had been dismissed in the 1979 ruling. We submitted that the earlier dismissal precluded the reassertion of the "fair and honorable dealings" claims. The Court rejected our proposition, reasoning as follows:

> [The 1979 order] was not meant to delete any true accounting claims already included in Claim 7 * * * simply because the specific item happens to deal with the same subject matter (e.g., land, oil, gas or education) as a dismissed claim. What the [1979] order did, and was meant to do, was to prevent plaintiff from attempting to restate and reinvigorate the dismissed claims, which were not accounting claims, in the form (if not the substance) of accounting claims in order to try to bring them now, for

> the first time under Claim 7. But true accounting-claims, involving the disposition of tribal funds and property, have always been warp and woof of Claim 7, and they remain so. If the issue is whether the Government, as fiduciary, faithfully managed or used Navajo assets, Claim 7 covers the question.

224 Ct. Cl. at 181-182, 624 F.2d at 986. (Emphasis in text.)

The Court offered an example of how a dismissed claim could remain viable in Claim 7. It pointed to the government's alleged failure to provide educational and other services to the Navajos and concluded that dismissal of that claim did not:

> prevent the plaintiff from urging [in Claim 7] that defendant must account for the use and disposition of educational monies appropriated by Congress to or for the use of the Navajos specifically; the latter aspect is and has always been fully a part of the general accounting claims we are now considering.

Id. In contrast, the Court indicated that a "broader contention" apparently within the dismissed claims, i.e., the United States' failure to appropriate or make available sufficient funds to educate the Navajos, could not be restated in Claim 7. An analysis of the specifics of the claims becomes essential.

One of the bases for our opposition to the Bill, in fact, is that it generalizes regarding claims which have been described by the Court of Claims as "byzantine in complexity." Navajo Tribe v. United States, 220 Ct. Cl. at 362-364, 601 F.2d at 537-538. Even though some clarification might be obtained by reference to the 1979 decision, the present status of the dismissed claims would still not be apparent. Consequently, we undertook, in our letter of June 14, 1983, to up-date the status of the dismissed claims in the context of their pendency or disposition in other Navajo dockets. Because that analysis demonstrates, we submit, that the relief sought in the Bill is unnecessary to assure that the Tribe has had a fair opportunity to litigate its claims, we restate it here.

Specifically, Claims 1 and 2 sought a declaration that the Treaty of June 1, 1868 was invalid and a judgment for the fair market value of Navajo aboriginal land. These claims were the subject of a judgment in Docket No. 229. That judgment awarded $14,800,000.00 to the Navajo Tribe on September 18, 1981 for the fair market value of their aboriginal lands.

Claim 3 complained of the adequacy of the agricultural land provided under the 1868 treaty and contended that the government was liable for damage which allegedly occurred from mismanagement through overgrazing. The management of all lands on the reservation, however, is the subject of inquiry under Claim 7 of Docket No. 69.

Claim 4, subtitled "Education; Schools," alleged that the United States failed to ensure the civilization and education of the Navajos under the 1868 treaty. Trial Judge Bernhardt ruled that the obligation to provide education extended for 10 years only. The Court of Claims affirmed this view. 224 Ct. Cl. at 197-199, 624 F.2d at 995-996.

Claim 5 alleged a breach of fiduciary duties by the United States with respect to the Tribe's natural resources and other tribal property. This claim is also the subject of Claim 7 in Docket No. 69 and Docket No. 299. In addition, oil and gas mismanagement claims, as well as claims for the wrongful disbursement and handling of tribal funds and the failure to fulfill the provisions of Article 8 of the 1868 Treaty, were the subject of a judgment award of $22,000,000.00 to the Navajo Tribe in Docket No. 353 on June 8, 1982. Similar claims for mismanagement of copper, vanadium, uranium, sand, rock and gravel resources were tried during February-March 1983 and will shortly be pending on briefs before the Claims Court in Docket Nos. 69 and 299. Other resources and property claims have been scheduled for trial by the Trial Judge's order of July 1, 1983. Specifically, trials have been set into 1986, including: timber and sawmill claims, January 23, 1984; coal, water, rights-of-way, mission sites, and related claims, May 15, 1985; and, grazing land claims, January 10, 1986.

Claim 6 alleged that miscellaneous facilities provided under the 1868 Treaty were inadequate and that their construction was delayed. To the extent that such facilities were mismanaged, the claim would then be pending under Claim 7 of Docket No. 69.

Claim 8 alleged the breach of an agreement in 1868 to return Navajo aboriginal homelands in return for the services of individual Navajo Indians as scouts and guides during the Apache war. Claims of individuals, however, are not justiciable under the Act. The tribal claim for aboriginal lands, or the other lands, was the subject of the judgment in Docket No. 229 as noted above.

From this discussion, it is evident that the "dismissed claims" of any substance, i.e., those addressing the Government's handling of tribal monies or property, are also the subject of Claim 7 in Docket No. 69 or of claims presented in Docket No. 299 and are therefore still viable. Specifically, Claims 3,

4, 5, and 6 are, in part, the subject of Claim 7 in Docket No. 69; Claim 5 is the subject of Docket No. 299. Indeed, Claims 1, 2, 5 and 8 have, in part, been the subject of substantial judgments already entered in favor of the Tribe in Docket Nos. 229 and 353. Claim 4, to the extent not available in Claim 7, is addressed on the merits in the Court of Claims 1980 opinion. In these circumstances, we would submit that the proposed legislation is unnecessary to provide the Tribe a fair opportunity to pursue its claims. Further, the proposed language inaccurately generalizes regarding "claims" which are, as the Court of Claims said, "byzantine in complexity."

Finally, affording an independent jurisdictional grant where judgments have already been entered, merit rulings made, and claims otherwise presented or preserved, promises to unsettle and further protract the resolution of these claims. The grant could encourage other tribes to seek jurisdictional authority to reopen results already obtained under the Act when those results are later thought unsatisfactory or, with new counsel, to present entirely new ideas and theories of their past or current claims with the hope of greater success before the current tribunal.

For the reasons discussed, we continue to oppose both the relief sought in the Bill and the proposed language. The Office of Management and Budget has advised us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

September 28, 1979

ORDER

ON PLAINTIFF'S MOTION FOR
CLARIFICATION

The plaintiff has filed a motion for clarification of our opinion of June 13, 1979, in which we dismissed claims 1 through 6 and claim 8. In so doing, we stated that "This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets." (Footnote 1). Plaintiff now asserts that in this footnote we contemplated the possibility that the dismissed claims still might be asserted as part of claim 7 in docket No. 69, a general accounting claim that has been consolidated with the accounting claims in docket Nos. 299 and 253, and which therefore was not before us.

Plaintiff is mistaken. Footnote 1 was intended to make clear that despite the dismissal of claims 1 through 6 and claim 8, those claims could be asserted in the other pending dockets (Nos. 229, 299 and 353) if in fact they "are present in those dockets." The determination whether the dismissed claims are so present is a matter for the trial judge. Obviously, we would not have dismissed claims 1 through 6 and claim 8 in docket No. 69 if we had contemplated that all of those claims could be fully pressed under claim 7 in that docket. To the contrary, we held that the plaintiff's previous withdrawal of claims 1 through 6 and claim 8 in docket No. 69 precluded plaintiff from subsequently reasserting those claims because at the time of reassertion the statute of limitations had run on them. The plaintiff may pursue these dismissed claims only if, and to the extent they are also part of the claims asserted in the dockets other than docket No. 69.

WAIVER OF RES JUDICATA DEFENSE BY CONGRESS

Assiniboine Nation, et al. v. United States, Docket No. 10-81L (Order of August 13, 1981).

Judgment - $16,394,625.16.

Blackfeet Tribe of the Blackfeet Reservation v. United States, Docket No. 649-80L (Order of June 19, 1981).

Judgment - $29,357,453.00

Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket No. 54-81L (Order of September 30, 1981).

Judgment - $22,690,625.00

Mr. HALL. Thank you.

I notice in looking at this record that Harold Mott, who was the attorney back at that time, according to Mr. Richardson's testimony that he filed with us, filed an amended petition which deleted several of the originally pleaded claims, that the attorney contract with Mr. Mott required approval by both the tribe and the Secretary of the Interior for any compromise settlement or other adjustment of the claims.

What about that?

Mr. LIOTTA. It is my understanding that is somewhat mistaken. The contract that the attorney had, in our review of it and my estimation, provides for the approval by the tribe and the Secretary of the Interior of any settlement.

As indicated by the claims court in 1979, the attorney, under other provisions of the contract and as part of his employment, had to make certain decisions. That is part of being an attorney. That court held that he did not need approval of the Secretary of the Interior or the tribe to withdraw claims.

Mr. Chairman and members of the committee, I would submit that if this was so, that if any attorney representing anyone—let's say the tribes—had to go back to the Secretary of the Interior or the tribe for various facets of the litigation, the courts would be totally submerged and encumbered and the case would never be over.

The contract, I submit, provided that the attorney use his judgment, and he used his judgment.

Mr. HALL. Do you have a copy of the contract entered into between Harold Mott and the claimants here?

Mr. LIOTTA. I don't know whether I have a copy of it, but the——

Mr. HALL. Do we have a copy of the document that you hold in your hand?

Mr. SCHAAF. This is exhibit A to Mr. Gorman's statement in your packets. If you would turn to page 51-A, this is a printed petition for certiorari to the Supreme Court, but it contains all of the relevant and underlying materials. And 51-A is a copy of the Mott contract.

The particular provision is on page 54-A, section 6. Mr. Liotta has also referred to section 2 which is on page 51-A.

Mr. LIOTTA. Basically, Mr. Chairman, in the 1979 case, the judge pointed to article VI, which says any compromise of settlement or other adjustment of the claims shall be subject to the approval of the tribe and the Secretary of the Interior. We recognize that.

In the same case, the court pointed to the kind of the decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract, to diligently prosecute the claims and to assert his best efforts to satisfactorily conclude them within the terms of this contract.

Mr. HALL. When they started out with this attorney, Harold Mott, how many claims did they plead in this suit, seven?

Mr. LIOTTA. Well, sir, I think there was more than that. But I think what the subject of this proposed legislation is, is claims 1 through 6 and claim 8.

I think it might be helpful if I go through sort of a litany here to show you what has happened as to those claims and what is happening as to those claims. It might be helpful to you. I think there were other claims within the purview of that suit.

I would like to also preface my remarks by indicating that this case is now in broad terms 33 years old.

Mr. HALL. The Supreme Court refused a writ in July 1980.

Mr. LIOTTA. Pardon me, sir?

Mr. HALL. The Supreme Court refused a writ in 1980, according to records I have here.

Mr. LIOTTA. That may be so.

Mr. SCHAAB. That is correct

Mr. LIOTTA. Also, I would like to point out that the claims were withdrawn in 1969, and I think action took place by another attorney sometime in the 1970's.

Mr. HALL. But when did the claimants find out that these seven claims had been dismissed and amended pleadings had been deleted?

Mr. LIOTTA. I don't know. I would assume—I really don't know the answer to that.

But as their attorney, and if I was the attorney in the case, I am sure that there must be discussions going back and forth. I am sure, as they are here, they must have been in the courtroom. I can't contradict what anyone said. I don't know the answer.

Mr. HALL. Are there any people today who were parties to that original contract between Mott—here is a Raymond Makai. Is he still living?

Mr. SCHAAB. Mr. Chairman, Mr. Makai was chairman of the Navaho Tribal Council at the time the Mott agreement was made, and he signed the agreement in his capacity of tribal chairman. So far as we were aware, Mott made no report to any component of the Navaho tribal government, to the tribal council, or the chairman of the tribal council.

Mr. HALL. Is he still living?

Mr. SCHAAB. Mott? Yes, he is still living. He was in Fort Smith, Ark. He has written a letter, which is exhibit B to Mr. Gorman's statement—it is in your packet—giving some explanation of why this amendment was filed in 1969.

His explanation is that he was induced to do it by Ralph Barney, who was General Counsel for the Indian Claims Commission at that time, in order to simplify the form of the petition that Mott's predecessor, Norman Littel, who had prepared this petition—the petition is on page 12 of this petition for cert, 12-A. It has the index of claims.

Since the chairman is an attorney, I am sure your practiced eye can take a quick look at it and tell that it is a rather complex piece of drafting.

According to Mott's letter in 1983 to Chairman Andrews of the Senate Select Committee on Indian Affairs, Mr. Barney, the General Counsel of the Indian Claims Commission, suggested that Mott should reorganize this pleading, this petition, filed in 1950, by withdrawing seven of the eight claims and leaving everything under the seventh claim. Mott says he thought that was what he was doing. He didn't intend to drop any claims. He did not intend voluntarily to dismiss any claims.

Mr. HALL. What kind of an education did Raymond Makai have?

Mr. SCHAAB. Raymond Makai.

Mr. HALL. Yes.

Mr. SCHAAB. I don't know. Perhaps Mr. Gorman knows.

He was chairman of the tribal council between 1962 and 1970. He served two terms.

Mr. HALL. Was he an educated man in any way? Had he been to school?

Mr. GORMAN. Mr. Chairman, Mr. Makai was the chairman of the Navajo Tribe at that time when Harold Mott was the general counsel for the tribe. Mr. Makai, I am rather sure that he has a high school education plus more, but I don't think he has a degree. But he has enough knowledge, as far as being the chairman of the Navaho Tribe.

Mr. HALL. My time has expired. Let me pass this on over to Mr. Boucher for questions.

Mr. BOUCHER. The Assistant Attorney General who spoke indicated that perhaps adoption of the bill in its present form might extend the jurisdiction beyond what Mr. Richardson had intended and create an unfortunate precedent for doing that.

Perhaps I have misinterpreted your statement. If I have, I hope you will set the record straight. If I have not, I wonder if you would suggest ways to amend this bill to restrict the jurisdiction we would confer to that which in fact was requested and no further?

Mr. LIOTTA. No, sir, I would like to address that, if I may.

I would like to correct something first, though. Insofar as the letter of Mr. Mott, I refer the committee chairman to the letter and point out that Mr. Ralph Barney was the chief of our Indian claims section, he was not with the Claims Commission. I think that is important. So there was no representation made by any members of the Claims Commission. I am sure it was an error.

Mr. SCHAAB. That is correct. It was an error.

Mr. LIOTTA. Also, if you look within the purview of that letter, it is quite interesting, some of the things Mr. Mott is saying. He says, if I may,

While serving as the claims attorney for the Navajo Indians, Ralph Barney, an attorney for the Department of Justice in charge of Indian claims, requested me on three occasions to consolidate the several claims then pending before the Indian Claims Commission. In particular, his argument to me was that the "cover-all" complaint of case No. 69, Docket No. 7, was sufficient to provide appropriate relief on all the Navajo counts.

I had my assistant reassess the claims and certain consolidations were made.

The present claims attorney, Mr. Schaab, believes, and has many times asserted, that No. 7 does in fact cover the Navajo claims, yet to be certain of full protection for the Navajo Tribe, he wishes the claims consolidated to be unconsolidated.

Now, sir, if I may, I think it is important to turn my attention to these claims as I understand them and what has happened to them. As I indicated, there were seven claims, claims 1 through 6 and claim 8. As indicated in our submission—and I will do this quickly—that claim 1, for example, suit for the fair market value of aboriginal lands as allegedly protected by the treaty of Guadalupe Hidalgo [1846] and the treaty of 1849, ratified by the Senate on September 9, 1850.

These were the same facts as alleged for the basis of a claim in docket No. 229, which was pending.

Claim 2, the alternative claim for aboriginal lands, was a suit for the fair market value of aboriginal lands by fraud and duress which Indian title claim was extinguished by the invalid 1868 treaty.

Claims 1 and 2 were subject to a judgment of $14,800,000 in docket No. 229. This docket is now closed. Those are two of the claims that they want you to reopen.

Claim 3 is a suit for inadequacy of agricultural lands provided under the treaty of 1868, and for damage to treaty lands by overgrazing. A claim for mismanagement of grazing and other lands is included in claim 7 of docket No. 69 and in docket No. 299. The trial date on that claim is set for January 10, 1986.

As to claim 4, the suit for failure to provide educational and other services under article VI of the 1868 treaty, the Court of Claims sustained the trial judge's holding that the obligation to provide civilization, education, extended for 10 years only, or until 1878.

As to claim 5, it is a suit for breach of fiduciary duty by the United States by exploiting and allowing others to exploit the tribe's natural resources—oil, gas, vanadium, timber, et cetera—without adequate consideration. This claim is also included in claim 7, docket No. 69 and in docket No. 299.

An oil and gas case, along with claims for wrongful disbursement of tribal funds and failure to fulfill terms of article VII of the treaty of 1868, were subject to a judgment for $22 million in docket No. 353 on June 8, 1982. Docket No. 353 has thus been closed, and similar claims for mismanagement of copper, vanadium, uranium, sand, rock, and gravel were tried in 1983 and are pending plaintiff's brief in docket Nos. 69 and 299. I believe the claim is for $139 million. I am not sure of that.

Timber and sawmill mismanagement claims are set for trial in January 23, 1984. Coal, water, rights-of-way, mission sites, and related claims are scheduled for trial on May 15, 1985. Grazing land claim, covering an area of 25,000 square miles, is set for trial in

docket Nos. 69 and 299 on January 10, 1986. I believe the grazing claim is for $365 million.

I will be finished in a moment, gentlemen. I am sorry to hold you up, but this takes a little time.

Claim 6 is a suit for violation of the 1868 treaty by failing to provide adequate construction of buildings and shops. This mismanagement of property claim is pending under claim 7, docket No. 69. The claim has not been scheduled for trial.

As to claim 8, it is the suit on breach of an agreement in 1868 to restore aboriginal homelands in return of services of individual Navahos in the Apache wars. The aboriginal lands were paid for in the judgment of $14.8 million covering claims 1 and 2.

I point that out to give you the history as to what has happened here.

Now in response, sir, to your question, I think that I cannot recommend any alternative to what is proposed. I will tell you why. I think that, first of all, this bill, if it is passed, will lead to many more proposals coming for you to open litigation of this time.

I would suggest to you that the case has been pending for 33 years, that it is time for litigation to end. There have been payments made here and many of these claims are pending.

Mr. BOUCHER. Let me interrupt you on that point.

Mr. LIOTTA. Yes, sir.

Mr. BOUCHER. It is my understanding, based on Mr. Richardson's statement and the statements made by the other gentlemen who testified, that all that they are seeking is to have the Court of Claims hear some seven claims that were voluntarily dismissed by the attorney for the Navahos. Under that definition, they cannot be pending today.

So what are the claims that are presently pending? And if they are encompassed within any of these seven, is there some way that we could redraw the bill to more narrowly define those that are not pending?

Mr. LIOTTA. It is difficult to know under the present bill, may I say, as to how far they could go. I mean that in good faith. I am not talking about anything pejorative or anything of that sense.

I have indicated to you the status of the present cases. I think that probably as to the education treaty, they want to go beyond—claim 7—they want to go beyond what the treaty has provided.

I cannot, I am sorry to say—perhaps this gentleman can—but I cannot make any suggestions as to how you could pin this down a little closer. But I think that, as it stands, and anything close to it would open the cases wide open. I would suggest to you that they have had their day in court or they are having their day in court.

Mr. BOUCHER. Let me direct your attention to page 2 of the bill, beginning on line 5, where, as one of the qualifications for the conferral of jurisdiction on the Court of Claims for any particular thing, it must have been a claim which, and I quote, "to have been voluntarily dismissed by the tribe before being considered or decided on their merits."

The many cases to which you previously referred that are presently pending would not have been cases that were voluntarily dismissed by the tribe before being considered on their merits. So you

are not suggesting to us we would be opening the door to consideration of those claims in the Court of Claims directly, are you?

Mr. LIOTTA. These very claims that I discussed are the very claims that they want to reopen—claims 1, 2, 3, 4, 5, 6, and 8. Those are the very claims that I understand they want to reopen.

Mr. BOUCHER. You are saying that those claims are presently pending in some other forum?

Mr. LIOTTA. Some of them are still pending in the courts; yes.

Mr. BOUCHER. Why would they want to reopen them if they are presently pending? I don't understand that.

Mr. BARBER. May I speak to that?

Mr. BOUCHER. Yes, sir, please.

Mr. BARBER. My name is Paul Barber. I am one of the counsel for the Navaho Tribe.

I think what counsel for the Department of Justice is trying to do is confuse the committee as to what is pending and what isn't. Simply stated, claim 7 was never withdrawn, and the court has held that there clearly are some overlapping parts between the withdrawn claims, 1 through 6 and 8, and claim 7 which was never withdrawn.

Counsel for Justice, in summarizing what each of claims 1 through 6 and 8 were, when he went through that rapid succession of summaries, attempted to describe them in terms that met the overlap—that is, he described them in the terms that may overlap with claim 7, the remaining claim that is still, for the most part, pending in the claims court right now.

In fact, there are other parts to those claims which are lost forever without being heard on the merits.

Mr. KINDNESS. Could we hear about them?

Mr. BARBER. Well, I think the committee of the tribal councilmen addressed the education claim. Specifically, claim 4 of the six claims is of utmost importance to the members of the tribe. The claim for education is a claim based on the failure of the United States to deal fairly and honorably with the Navaho people in fulfilling their treaty promises, and in honoring the appropriations for education in the time after the treaty, for a period of several years.

The court specifically held—and the citation to that is part of Mr. Gorman's testimony—the court held that claims based on fair and honorable dealings that are not specifically tied to the reservation or some asset of the tribe are gone forever. Fair and honorable dealings is a unique section of the Indian Claims Commission Act. It was passed in 1946 to give a very broad scope to the jurisdiction of the Indian Claims Commission.

In fact, the Secretary of the Interior—I think it is pertinent to understand what went on before the Indian Claims Commission Act. Prior to 1946, tribes, when they wanted redress for a wrong done by the United States, had to come to Congress and get a special jurisdictional act to allow them to sue. They were barred from suing the United States without a special act. In 1946, Congress said we are going to set up a commission and hear these cases once and for all, and we no longer want them to be thrown out of court on technicalities, we want them to be heard on the merits.

Secretary Ickes, in a report—this is House Report No. 1466 of the 79th Congress, 1st session. The late Honorable Henry M. Jackson——

Mr. KINDNESS. What are the claims? What are the claims? That the problem.

Mr. BARBER. This claim is an education claim.

Mr. KINDNESS. I mean, beside that one, are there others?

Mr. BARBER. Yes; there are seven of them.

Mr. KINDNESS. I mean the ones that you are referring to that have not been described in the testimony previously.

Mr. SCHAAB. Let me make one comment on that.

Mr. Liotta suggested that one of the purposes of the tribe in seeking enactment of this bill is to reopen matters that are covered by the two judgments that he referred to in docket Nos. 229 and 353.

That is not correct. The language of the bill expressly bars consideration by the court under the legislation of matters that have previously been determined on the merits by the Court of Claims. Whatever is covered by a judgment already of record disposing of—say, the aboriginal land claims, which the docket No. 229, the judgment of 229, or the oil and gas claims, 353—those had been disposed of and they will not be reopened.

The only matters that may be revived under the bill in the first six claims of the original petition are what are called fair and honorable dealings claims, claims based not upon breach of contract, breach of treaty provisions, or breach of equitable duties as a trustee holding assets, reservation assets, reservation resources——

Mr. KINDNESS. What are those? Are those known at this point?

Mr. SCHAAB. The fair and honorable dealings claims?

Mr. KINDNESS. Right.

I am sorry—I am on the gentleman's time.

Mr. SCHAAB. They are not known precisely, and we are not prepared to make any specific enumeration of what claims they are.

The education claim is the one that we do know about, and it is very important. And that is what the tribal representatives spoke about. That is the one that makes this bill a matter of considerable practical importance.

Mr. KINDNESS. Will the gentleman yield further?

Mr. BOUCHER. I will yield, subject to reclaiming my time momentarily.

Mr. KINDNESS. Thank you.

I just wonder if we could narrow what it that is being presented to the subcommittee? Would there be a time in the future when those additional claims could be identified and be disclosed to the subcommittee so that we know what we are dealing with?

Mr. BARBER. The claims are known in the sense that they are all stated in the original petition, and that is part of the record, claims 1 through 6 and claim 8.

The difficulty is in trying to summarize these claims without giving up something on behalf of our client. The difficulty is in trying to decide, and we think it is for the court to make that decision, what was lost and what hasn't been lost. We are reluctant to say at this time to condense those claims 1 through 6 and 8. They

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are exactly what they say they are in the petition, but it is for the court to decide what they are, what was lost and what wasn't lost.

Mr. SCHAAB. There is another factor also that deals with the Government's handling of tribal property. The Government has not yet completed its accounting to the tribe of the transactions relating to dispositions of tribal property.

We can't, until the Government completes that accounting, raise issues. And it will be when that accounting is completed that we will then have to file exceptions to the accounting and raise these issues that you are now asking us to specify. So it is premature in the course of the litigation for us to do this, because we haven't see their accounting report yet.

In addition, just as a matter of frank disclosure of where we are with the case, we simply haven't identified them yet with any particularity.

Mr. SCHAAB. Again, the language of the bill contains safeguards that we will not, in raising such issues at a later stage in the litigation, reopen matters that have already been determined, and we will not intrude on matters that are already pending.

Mr. BOUCHER. I was wondering if language which amends this bill to clarify that any claim which is pending in any forum would not be a subject of jurisdiction conferred by this legislation on the Court of Claims would be amenable, first to the Attorney General's Office and, second, to the counsel here before us?

The amendment which I would propose would be, simply, on page 2, line 8, at the end of line 7, strike before the Court of Claims, and that would simply provide that it is clear that the jurisdiction herein conferred does not relate to any claim which is presently pending.

Mr. SCHAAB. Which are no longer pending.

Mr. BOUCHER. Which are no longer pending; that is correct.

Do you have any problems with that?

Mr. BARBER. I think the fear that it overlaps with something that is currently pending is misplaced. If we file this suit—and we are given 6 months under this act to file the suit—it would be filed in the same court where claim 7 is still pending. That is the U.S. Claims Court. If there is any overlap at all, the cases will be joined, and the judge will take care of it. It will cost no economic loss, no additional burden. It is only the chance that we have lost something that we are afraid of. Obviously, if we hadn't lost something, we wouldn't be seeking the legislation.

The Government is here trying to say that we didn't lose anything. If they really believed that, they wouldn't be opposing the legislation.

Mr. BOUCHER. Let me ask the Justice Department if the suggested amendment improves the measure from that standpoint?

Mr. LIOTTA. I would have to address it this way. First of all, I would have to study it. But let me say that I must take exception to what counsel was saying. Our purpose in being; we are here for a good purpose. We want to be fair.

What I am suggesting to you is the recitation of what has happened here indicates that these folks have had their day in court and have been paid, or they are going to be paid, or it comes under

claim 7. They were represented by an able attorney apparently, and he made certain decisions.

It is obvious to me also from what counsel said that they are not sure at this point as to what they are talking about as to what would happen and what wouldn't happen. I would suggest that if this is reopened, we are going to start a number of years back and they are going to get into a number of things.

I don't know exactly what the meaning of this language would be, "pending," and "has not been previously determined on the merits." I am not sure of the ramifications of that before the court as to what that would let in or not let in. I would have to look at it.

I gather that these fair and honorable dealings claims, or whatever they may be, would be referred back to claims 1 through 6 and 8, and I am not sure how wide open that would start this all over again. I think they have had their day in court is what I am suggesting.

Mr. BOUCHER. Let me simply suggest this. I am personally very sympathetic to the case that Mr. Richardson and those who have testified here are making today. I would hope that, if the Department of Justice has any proposed amendments which would place the bill in better condition and make sure that the jurisdiction conferred is only that that is being requested and no more, that those amendments would be submitted to the committee prior to whenever we mark this up.

Let me just ask two additional questions. First of all, are there any third parties involved in this, or is it simply a matter of the Navaho Tribe versus the U.S. Government? I notice that a statement has been submitted by the Santa Fe Mining, Inc. and by the Santa Fe Pacific Railroad Co. Do they have some interest in the outcome of any of these claims, or does any other third party have an interest?

Mr. SCHAAB. Mr. Muys is in the room, Mr. Boucher.

We have discussed their concerns and are agreeable to the suggested addition of a sentence to the bill.

TESTIMONY OF JEROME C. MUYS, COUNSEL, SANTA FE MINING, INC. AND SANTA FE PACIFIC RAILROAD CO.

Mr. MUYS. Thank you, Mr. Chairman.

I am Jerome C. Muys. I am counsel for the Santa Fe companies.

We have no position on the merits of this legislation. But as my statement indicates, there is pending in the Federal District Court in New Mexico a lawsuit by the Navaho Nation against the United States, the State of New Mexico, the Santa Fe, and a host of private landowners, which seeks to quiet title, essentially, to 1.9 million acres in that part of the State, and seeks to cancel conveyances and damages for trespass, and a host of other claims.

Our only interest in this legislation is that Congress make it clear that, in considering the merits of this legislation by Congressman Richardson, it indicate that it is not prejudging in any fashion the contentions that are before the Federal District Court in New Mexico.

Out there, the defendants, Santa Fe and the State and the United States, have argued that one of these judgments in Indian

Claims Commission Docket No. 229 is a bar to the claims that are being made in New Mexico currently. The Navaho Nation attorneys have denied that, and there is dispute as to the legal significance of an Indian Claims Commission final judgment and what effect, if any, it may have on other litigation.

We have suggested language that would just be a disclaimer, essentially, that Congress was not trying to deal with that issue and it is going to leave legal effect of the judgments we are concerned about in their status quo and not prejudge that issue.

Otherwise, we have no position on the merits.

[The statement of Mr. Muys follows:]

PREPARED STATEMENT OF JEROME C. MUYS

Mr. Chairman, my name is Jerome C. Muys. I am a partner in the Washington office of the Denver law firm of Holland & Hart, 1875 Eye Street, N.W. My testimony is presented on behalf of Santa Fe Mining, Inc. and Santa Fe Pacific Railroad Company, both headquartered in Albuquerque, New Mexico. We appreciate this opportunity to present our views on H.R. 3533.

Santa Fe Pacific holds title to over 4 million acres of fee mineral estates in New Mexico and Arizona which are derived from the original land grant from the United States to the Atlantic and Pacific Railroad as consideration for building a railroad from Missouri to California. After Santa Fe Pacific acquired these lands, it sold nearly all of the surface estates and retained the mineral estates.

The Navaho Tribe is currently claiming title to 1.9 million acres of land in Northwestern New Mexico in a class action suit filed on October 6, 1982 in the United States District Court for the district of New Mexico, *Navajo Tribe* v. *State of New Mexico, et al.*, Civil No. 82-1148 JB. These lands are a portion of the lands which formed the basis for the claims brought by the Tribe in Indian Claims Commission Docket No. 69, and which are the subject of S. 1196. These lands were also the subject of claims for which the Navaho Tribe received $14.8 million pursuant to a judgment entered in Indian Claims Commission Docket No. 229.

In the pending New Mexico lawsuit the Tribe has also requested trespass damages, the invalidation of conveyances from the United States to third parties, and an injunction against further trespass with respect to a large area of Northwestern New Mexico. This area includes the lands described in the first, second, and eighth claims of Docket No. 69 and in the two counts of Docket No. 229. The United States, the State of New Mexico, Santa Fe Mining, Inc., and Santa Fe Pacific Railroad Company are defendants in that action, and the alleged class of other defendants includes all land owners in the 1.9 million acres subject to that litigation. In addition to other contentions, Santa Fe and other defendants have moved to dismiss the pending action on grounds that the Tribe was previously compensated for loss of these lands by the payment of the judgment in Docket No. 229, and that that judgment is, therefore, res judicata of the claims asserted in the pending action. The Tribe has countered this contention and has taken the position that the satisfaction of the judgment in Docket No. 229 does not prevent it from asserting new claims for money damages or to actual ownership of the same lands. All of the title held by Santa Fe is derived from conveyances from the United States or grantees of the United States.

Santa Fe believes that it is imperative that Congress, in legislating with respect to the narrow issue with which this bill purports to deal, make it clear that it does not intend its action to have any effect on the finality of the judgment in Docket No. 229 or the legal contentions as to its effect in the pending litigation in New Mexico. Consequently, Santa Fe proposes that the following disclaimer be added as section 2 of the bill:

This Act shall not affect the finality of the judgments entered in Indian Claims Commission Docket Nos. 229 and 353 or later the effect, if any, of those judgments on other litigation brought by the Navaho Indian Tribe against the United States or third parties in other judicial proceedings.

Mr. BOUCHER. You are asking that if the committee acts favorably on the bill, that it adopt as an amendment the language you are proposing on page 3 of your statement?

Mr. MUYS. Yes; we have worked that out with the counsel for the tribe.

Mr. SCHAAB. It is agreeable to the tribe.

Mr. BOUCHER. Does counsel to the tribe agree that the amendment should be adopted?

Mr. SCHAAB. Yes; we, I guess, would prefer to have it as a statement in the committee report rather than in the bill, but if the committee decided to amend the bill to add it, we would not object.

Mr. BOUCHER. You don't object to the substance of the suggestion?

Mr. SCHAAB. No; we think that this is not the appropriate place to go into these matters of collateral, estoppel, or whatever else may be involved in that other litigation

Mr. BOUCHER. Are there any other third parties that would be affected one way or the other about the passage of this?

Mr. BARBER. Your Honor, we don't think so. The claims court jurisdiction is limited to suits between plaintiffs against the United States, and they are the only parties of the litigation we are involved in.

There are other parties to the Santa Fe litigation, but I think this language would make it neutral as to them also.

Mr. BOUCHER. I have one additional question, if anyone can compile this. I am wondering what the total amount of the seven claims in question are, just in dollar terms.

Mr. SCHAAB. In dollars?

Mr. BOUCHER. In dollars.

Mr. SCHAAB. A question was raised concerning that in connection with the education claim in the Senate hearings this morning. As I am sure you are aware, when you develop claims for trial, you rely on expert witnesses and a lot of documentary evidence. You have to prove liability and you have to prove damages.

The education claim is based upon kind of an unjust enrichment theory that the United States should pay the Navahos for failing to deal fairly and honorably with it on this issue, measured by what it saved itself by failing to fulfill the treaty requirement of proving a schoolhouse and a teacher for every 30 children. The variables are the Navaho child population of school age.

The amount that an expert witness would develop from that data hasn't yet been developed. It will probably be several million. In the Senate hearings, the figure was somewhere between $10 and $50 million, something like that. The variable is the population of the school age children and the cost indexes that would be used in determining how much a schoolhouse and a teacher would cost.

Mr. BOUCHER. Is that the largest of the seven claims?

Mr. SCHAAB. That is the largest of the claims that we are aware of under this bill.

The other claims that are not affected by the bill that are now pending before the court under claim 7, the timber claim and the grazing claim, are quite large.

Mr. BOUCHER. We are not concerned about the ones that wouldn't be affected by the bill.

Mr. SCHAAB. Yes.

Mr. BOUCHER. You said between $10 and $50 million for the education claim.

Mr. SCHAAB. Probably, based on those variables.

Mr. BOUCHER. Do you have a total figure for the other five or six claims?

Mr. SCHAAB. We haven't—in response to Mr. Kindness' question, we haven't specified, we haven't enumerated, which ones we would try to bring out of the original petition. We are limited by the bill to the claims pleaded in the original petition.

Some of them are discernible. There is a claim, claim 1, for instance, for damage to Navaho tribal property, because the United States, under the treaty of 1850, which is the Treaty of Friendship, in which the United States pledged to protect the Navaho, failed to protect the Navahos, and they suffered damage.

Mr. HALL. Of course, that gets into something I don't think is before us right here at this moment.

Mr. Kindness, do you have any questions?

Mr. KINDNESS. I have no questions, Mr. Chairman.

Mr. HALL. Mr. Shaw.

Mr. SHAW. Yes.

The issue that seems to boil down to this—and I would like you, Mr. Schaab, to correct me if I am wrong—an attorney who is fully authorized to represent your clients made a judgment to drop a particular claim. You now, as the present attorney for the Navaho Nation, disagree with that judgment and are asking this committee to undo that decision and to require the courts to reinstate that claim; is that correctly stated?

Mr. SCHAAB. I think that is not quite the way I understand it. I think that Mr. Mott, according to his letter that Mr. Liotta referred to—it is in your packet—Mr. Mott didn't think he was dropping claims. He thought he was reorganizing his pleading. If that is all that he did, it certainly falls within the scope of his authority as the tribe's claims attorney.

The Court of Claims in 1979 held that what he had done was not reorganize his pleadings, but that he had voluntarily dismissed claims. That is what brought section 6 of his contract into play, because section 6 was designed to protect the tribe against this kind of action, dropping valuable claims without tribal approval. That is what brings the matter to Congress.

Mr. SHAW. What would be the difference in this particular, or in any other instance, where a lawyer may have made a mistake in judgment or where he thought he was doing one thing and the court said, "Hey, you really did something else?" I can look back to when I practiced law and there were several decisions that I would love to go back and revisit.

Why should this committee go back and mess with a decision that was made by the attorney and interpreted by the courts?

Mr. SCHAAB. For about 100 years, there has been on the books title 25, United States Code sections 81 and 81(a), which are statutes passed by Congress in the 1880's requiring attorney contracts with Indian tribes to be reviewed and supervised and approved by the Secretary of the Interior.

That system of protection of Indian tribes in connection with their dealings with attorneys—claims attorneys, general counsel, special counsel, any kind of attorney for an Indian tribe—is subject to that general Federal supervision. That is why section 6 was in

Mott's claims contract requiring secretarial approval and tribal approval for any settlement or disposition of a claim in the original petition.

Mott now says he didn't intend to dismiss any claims. When the Court said what he did legally had that effect—and that is the day in court that Mr. Liotta was talking about—not on the merits.

Mr. SHAW. But does sections 81 and 81(a), in effect, guarantee flawlessness in representation?

Mr. SCHAAB. No; it doesn't. But certainly in section 6 of his contract, it required that any claim that was going to be adjusted or settled or disposed of be approved by the tribe.

Mr. SHAW. This brings us to the point where—I think one of the earlier members of this committee raised this particular point. Are any of the individuals that were then speaking for the tribe still around?

Mr. SCHAAB. Well, the tribe is like any other government. Mr. Makai is around. He is not in the room today, and he has not had any connection with tribal matters since his defeat in 1970.

Mr. BARBER. Could I speak to that?

Mr. SHAW. Yes.

Mr. BARBER. The tribe is governed by a tribal council that consists of 87 members. That is the rulemaking body of the tribe. If its approval is to be given, it should go and be approved by the tribal council.

I personally examined all of the minutes or resolutions of the Navaho Tribal Council for the period in question, up to the time of this withdrawal, and the minutes of the advisory committee of the Navaho Tribal Council, which is similar to an executive committee. None of those minutes reflect any prior approval—or any approval at all, as a matter of fact—of this withdrawal of the claims.

Mr. SHAW. Let me stop you there and ask you a question. Do the minutes that you have examined appear to be accurate and complete minutes of what transpired, or are they spotty and sketchy?

Mr. BARBER. In my review of them, and we have examined minutes——

Mr. SHAW. I am asking for an opinion, obviously.

Mr. BARBER. We have examined minutes back into the 1920's when the tribal council was first organized. Back then, they sometimes missed things, but they are quite complete. I have a lot of confidence in them. They are transcribed in modern times virtually verbatim. Discussions are interpreted back and forth between Navaho and English, and there is a transcript made.

Mr. SHAW. Let me follow up on this line of questioning for just one more moment.

Have you gone back, Mr. Schaab, into court and raised this as a question as to whether the count was properly dismissed without some type of an affirmative showing that the law had been complied with and that Mr. Mott's client had been fully advised and, if so, what was the disposition?

Mr. SCHAAB. We argued the question several times, first to the Indian Claims Commission, and the Commission decided in our favor based on that provision of Mott's contract. The trial judge in the Court of Claims reached a similar opinion.

When Judge Friedman became Chief Judge of the Court of Claims, this was one of the early cases that he ruled on, and I think he was trying to clean his docket by seeing an area where he might be able to clean off what appeared to be quite a number of claims. It came, frankly, as a surprise to me that the Court of Claims, in its 1979 opinion, concluded that this fell under the normal authority of an attorney and was not within the scope of section 6.

Mr. SHAW. Are the appellant procedures still available to you on that?

Mr. SCHAAB. No; we asked for a rehearing. There was an opinion on the motion for reconsideration in this petition for certiorari, and we filed the petition for certiorari, and that was denied in 1980. Then we promptly—the opinion of the court is on page 9-A on reconsideration.

And then we argued one aspect of it in a different docket that resulted in an opinion of the court in May 1980, which is also, I believe, in your packets. That opinion said that the Justice Department was arguing that any matters within the first six claims could not be considered as part of the seventh claim because, under the 1979 ruling, they had been dismissed.

In 1980, the Court of Claims said no, that is not correct, that any matters that are properly part of claim 7 will remain as claim 7, despite Mott's 1969 amendment. The only thing that is wiped out by the 1969 amendment are claims that were presented in the petition as claims 1 through 6 and claim 8 that are not part of claim 7.

In answer to Mr. Kindness' question of what claims are these, the court didn't enumerate them, and we have not enumerated them, but the way to describe them is fair and honorable dealings claims. The most obvious one is the education claim. It is the most important one to the tribe.

The reason why this sticks in the tribe's craw is because education touches the Indian soul. It is something they didn't get. They were promised it and they didn't get it. Now, because of this decision by the Court of Claims in 1979, they are denied a hearing on their claim for it. That is why.

Mr. SHAW. I was very persuaded by the testimony of the gentlemen from the Navaho Nation, particularly the gentleman who referred to learning English because he had to in the U.S. Army. I think that he certainly made it clear his hunger for education. That is something that this committee certainly is recognizing.

Mr. Chairman, I think that, before we could take action on this, we would need more information. I am not sure that we really have a sufficient reason to reinstate a claim that the court has done away with without some of these other questions being answered.

I yield back my time.

Mr. HALL. Were all of the questions that have been raised in a very informal way here today—I know we haven't kept with the precedent that we usually follow because of the various questions that members desired to ask—but have all of the points that are seeking to be raised in this bill been previously raised in the courts?

Mr. SCHAAB. I guess I don't understand your question, Mr. Chairman.

We argued in the court proceedings on the effect of the Mott amendment to the basic petition. We argued that it did not have the effect of dismissing claims, that it was merely intended to reorganize a pleading. We also argued that, because of the way the original petition was framed, all the claims presented in the first six claims were included by reference in the seventh claim.

Mr. HALL. Have you raised the same objections that you are making here today in your writ of certiorari before the Supreme Court?

Mr. SCHAAB. Yes; you have the petition in your hand.

Mr. HALL. I am looking at page 7 of this petition in which it states that, "On October 1, 1969, petitioner's claims attorney filed a First Amended Petition in No. 69 (appendix E), as follows: 'The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25, and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.'"

That is on page 7.

Over on page 57-A, appendix E, appears a copy of that first amended petition, as I just read, addressed to the Honorable Commissioners of the Indian Claims Commission, and respectfully submitted, signed by Harold E. Mott, address Albuquerque, N. Mex., Claims Attorney for the Navaho Tribe of the Indians' attorney of record.

It appears to me just from a cursory examination of these briefs and what we have heard today that the same questions that you are raising today and they are being sought by this bill are some of the same questions that have already been before the court, as high as the Supreme Court of the United States, when they denied a writ. Is that a fair statement?

Mr. SCHAAB. The issue, of course, was the same. Whether or not these claims have been dismissed——

Mr. HALL. I understand that. But we are talking about issues here now.

Mr. SCHAAB. We are before Congress seeking enactment of the bill only because the Court of Claims held that these claims were voluntarily dismissed.

Mr. HALL. When you went from the Court of Claims, you went directly to the Supreme Court, or attempted to?

Mr. SCHAAB. Yes.

Mr. HALL. Did the Court of Claims have these same issues before it at that time that you are raising here today in this bill?

Mr. SCHAAB. Well, the Court of Claims had to decide what the legal effect of Mott's amendment of the petition in 1969 was.

Mr. HALL. Yes.

Mr. SCHAAB. And they held that it was a voluntary dismissal of those claims.

Mr. HALL. Right.

Mr. SCHAAB. We argued that it wasn't, but the Court held that it was. That is why we have come to Congress.

Mr. HALL. You are asking us to go back and allow this matter to once again go before the Court of Claims to consider those six or seven points that Mott dismissed?

Mr. SCHAAB. Yes; because the requirements of title 25, United States Code, section 81(a) were not fulfilled. That is the system of the tribe's interest——

Mr. HALL. All right. Was that citation that you just recited raised before the Court of Claims when they tried this case?

Mr. SCHAAB. Yes.

Mr. HALL. Raised before the Supreme Court in the writ of certiorari?

Mr. SCHAAB. Yes; and before the Indian Claims Commission.

Mr. HALL. This question comes into my mind. Why—and I am not trying to judge the merits of this case, certainly not—but why should this committee take action to reopen everything that the Court of Claims and the Supreme Court has already said have been decided?

Mr. SCHAAB. I guess that is the point that Mr. Liotta was trying to make, that we had our day in court, that we had our court on those issues.

Mr. HALL. That is my point.

Mr. SCHAAB. But we have not had our day in court on the merits.

Mr. HALL. But you raised the same question in the Court of Claims on those six elements that you say were inappropriately dismissed by their attorney. You raised it in the Court and the Court didn't agree with you.

Mr. SCHAAB. We raised in the Court the fact that the Secretary of the Interior and the tribe had not approved a voluntary dismissal of any claims.

Mr. HALL. I understand that.

Mr. SCHAAB. And the Court of Claims, in effect, held, without saying so, that it didn't make any difference.

We are asking Congress to decide that there is an underlying policy in the 1946 Claims Act to have claims disposed of on the merits and not on a technical issue.

There is also a question of fairness on an important matter like the education claim that should be presented and heard on the merits, and not dismissed on this kind of a technical basis.

So that is what it comes down to. We are not asking Congress to reverse the court's determination. That stands. If the court says that the legal effect of what Mott did in 1969 was to voluntarily dismiss the claims, that stands, and Congress has authority to say, "Nonetheless, you have jurisdiction to proceed to hear these claims on the merits, because of this underlying policy and because of the consideration of fairness."

Mr. HALL. Are there any other questions that any of the committee members would like to ask?

Mr. Kindness.

Mr. KINDNESS. Mr. Chairman, I do have a line of questioning I think may need to be pursued.

It has been stated that there is an accounting that has yet to be completed and provided to the tribe by the Government. Is there any way of estimating when that is to be completed?

Mr. SCHAAB. It has been ordered for about 3 years.

Mr. BARBER. The final accounting, I believe, is due this December, but the Government has recently by letter asked for essential-

ly an unlimited extension. So we don't have any idea when it will actually be completed.

Mr. SCHAAB. This is the so-called property accounting.

Mr. LIOTTA. As I understand it from my colleague, sir, it was scheduled, as the gentleman said, for December. There may be some delay. We have had some problem getting sufficient personnel on hand at GSA. That problem I understand is now solved. I would suggest it would probably take a year or a year and one-half, as my colleague states. It will take some time. But we have had the personnel problem. They didn't have sufficient people on hand in some of these instances.

Mr. KINDNESS. Would it be correct to state that, until that accounting is available and studied and perhaps some factual determinations are made by counsel for the Navaho Tribe, you certainly wouldn't be ready to go to trial, at least, or to go before whatever the forum might be with the exact claims that would be pursued and proven?

Mr. SCHAAB. That is correct.

Mr. BARBER. If what you are suggesting is that it would be wise to wait until it is done, I think that is not right. If this bill were enacted now, we would, within 6 months, refile claims 1 through 6 and 8, and we would move to join them with the existing accounting claim.

Mr. KINDNESS. I understand that, but we wouldn't know what we are doing. Do you see? I think we need to have some idea of what is involved before taking action on the matter.

Mr. SCHAAB. You can't, because the court's decision in 1979 was on jurisdictional grounds, and the court has determined that it does not have jurisdiction to consider any fair and honorable dealings claims. So we would not be able to take any action on the pending case to raise these issues. We have to have the bill passed in order to give the court jurisdiction to allow this process to go forward.

To turn back the litigation clock to where we were in 1979 before the——

Mr. KINDNESS. I am suggesting that what this subcommittee, and the full committee, and the House, and the Senate would, somewhere along the line, someone would want to know on a bill like this—it has a tough way to go unless the information is available—what is involved. We don't know.

Mr. BARBER. What is involved is a court decision. I submit that this body, Congress, will never be in a position to make the decision of what is or isn't overlapping with the other case. That is a court decision.

What we are asking for is to grant the court the jurisdiction to make that decision on the merits.

Mr. KINDNESS. What you have previously indicated, I believe, though, is that you can't state to this subcommittee what the nature of the claims might be in more specific terms than appear here in the exhibit to the petition for writ certiorari; is that correct?

Mr. BARBER. That is because we can't state them other than is stated here without possibly hurting the rights of our client to have everything that is stated in here heard. We would never at-

tempt to state that, except in arguments to the court. The court is the proper forum for deciding what does remain, what has been decided on the merits, and what overlaps with the existing cases. They are stated here in general terms, but——

Mr. KINDNESS. I am sorry to differ with you, but the only available forum is the Congress. The legislative remedy is the remedy being sought. Somewhat more information is going to be needed in order for us to know what it is with which we are dealing, I think.

I just suggest that as my opinion. There are others who may differ in that respect.

Mr. BOUCHER. Would the gentleman yield to me?

Mr. KINDNESS. I yield to the gentleman.

Mr. BOUCHER. Thank you for yielding.

As I indicated earlier, I am sympathetic with the general thrust of the argument that you are making. But I share Mr. Kindness' view entirely that we are going have to have some listing of the claims that you would seek to have considered in the Court of Claims prior to our acting favorably on the measure. That states my view.

Thank you.

Mr. SCHAAB. This is something beyond what we have described as fair and honorable dealings claims, claims that are based on that ground of the Indian Claims Commission Act of 1946, and we have identified the education claim as the one that is most visible.

The Court of Claims, in its 1980 opinion that you have, has indicated that fair and honorable dealings claims related to tribal property remain as part of the seventh claim. Now those are not covered by the bill because the bill does not apply to any matters that are still pending. So you have fair and honorable dealings claims that are not related to tribal property. That is where it is a little hard, as a matter of abstraction, to specify what these may be.

What Mr. Barber is saying is we don't think that the committee should put the Navaho Tribe in the position of waiving the right to raise issues that might be appropriate in the course of further litigation if this bill were enacted.

Mr. KINDNESS. May I suggest that, other than the educational fair and honorable dealings claim, there might not be any reason for the legislation.

Mr. SCHAAB. That is correct. I, frankly, don't expect to raise under this bill any other claim than the education claim.

Mr. KINDNESS. Yet, I don't think we would want to limit the legislation to just that area if there were other claims.

Mr. SCHAAB. I don't think we can be in the position, and I don't think the committee should put the Navaho Tribe in the position, of saying that is the only thing that you can raise under this bill.

The grounds for the bill is that there was a petition filed in 1950 that pleaded a variety of claims. Some of those were dismissed because of action of Mr. Mott that the tribe didn't know about that didn't approve. That violated, I think, the statute of supervision of the attorney contracts, and that is why Congress should do something about it.

The relief that the tribe wants is to be able to be put in the same position in the litigation that it was before 1979. At that time, there was no enumeration of what claims were covered by Mott's

1969 amendment. That is, as I understand your comments, what the committee is asking us to do at the present time. We really can't do it, and I don't see that it is reasonable to force the tribe to try to do that.

The education is certainly the clearest one, and it probably will be the only one. But I hate to say yes, it will be the only one, because we don't know how the future course of litigation will unfold.

Mr. KINDNESS. I think we are talking the practicalities of getting this legislation passed, and it has a narrow pass through which it has to go. I am just suggesting the realities of the legislative process in terms of how we can best make the case.

I, frankly, don't understand what comfort there is in knowing there is only one claim or there are only three claims that would be open for consideration by the court if the bill passes, as opposed to some indefinite number. At least you know that all of them were originally pleaded timely under the 1946 act.

Mr. SHAW. Would the gentleman yield on that point?

Mr. KINDNESS. Sure.

Mr. SHAW. Mr. Schaab, is what you are asking to do is to reinstate the pleadings as originally drawn without change?

Mr. SCHAAB. Basically, yes.

Mr. SHAW. So perhaps that is what we are missing here.

Do we have copies of those pleadings?

Mr. SCHAAB. Yes.

Mr. SHAW. They are in the court briefings?

Mr. SCHAAB. Sure.

Mr. SHAW. These are the original pleadings?

Mr. SCHAAB. It starts on page 11-A. It was filed July 11, 1950. It is a rather strange pleading.

Mr. SHAW. But these are the pleadings that you want? You are not looking to amend them further?

Mr. SCHAAB. The act would allow us to reassert them.

Mr. SHAW. I know the act would allow you to reassert them.

Mr. SCHAAB. And we would be limited by these. We would be able to drop anything alleged in that original petition that no longer seems pertinent. But we couldn't go beyond that.

Mr. SHAW. I thank the gentleman for yielding.

Mr. KINDNESS. I yield back, Mr. Chairman. Thank you.

Mr. HALL. Mr. Shattuck, our majority counsel, is recognized.

Mr. SHATTUCK. This claim was originally filed before the Indian Claims Commission under the Indian Claims Act of 1946.

Mr. SCHAAB. Yes.

Mr. SHATTUCK. Then what disposition occurred in the Indian Claims Commission?

Mr. SCHAAB. Well, it was pending from 1950 and, after the petition that was numbered Docket 69 was filed, three other petitions were filed, 229, 299, and 353. While Norman Littel was claims attorney for the Navahos between——

Mr. SHATTUCK. Yes; but what action was taken on this claim, this petition, by the Indian Claims Commission? Was it acted upon by the Commission?

Mr. SCHAAB. The litigation developed, the so-called——

Mr. SHATTUCK. No; how did it get to the Court of Claims, first of all, before the Indian Claims Commission?

Mr. SCHAAB. How did it get to the Court of Claims? It was transferred to the Court of Claims when the Indian Claims Commission was out of existence at the end, September 1978.

Mr. SHATTUCK. That is what I was seeking.

That legislation went through this subcommittee. So what happened was the Indian Claims Commission was terminated and, in the process of that termination, certain claims were transferred to the Court of Claims and the Court of Claims was given jurisdiction over those pending claims.

Mr. SCHAAB. That is right.

Mr. SHATTUCK. So this was one of the claims. So the first adjudication that related to this occurred as a result of all of the events that you have been describing, and that occurred before the Court of Claims itself. There was no narrowing of the claim or statement of claim as a result of an Indian Claims Commission determination. This is what you sought from the Court of Claims.

Mr. SCHAAB. The Indian Claims Commission allowed me, when I became claims attorney in 1973, to amend the petition in 1969 in order to, in effect, change Mott's amendment in 1969.

Mr. SHATTUCK. How was the matter before the Court of Claims in 1969?

Mr. SCHAAB. I will tell you exactly. The Commission allowed the amendment of the petition and, after that was done, the Government filed a motion raising a jurisdictional issue, that Mott's amendment in 1969 had, in effect, dismissed the claims that he described as being withdrawn. And when the Commission allowed me to file a new petition to, in effect, restore those claims in 1975, this was after the 5-year time bar in the original 1946 act, and the court or the Commission didn't have jurisdiction at that time.

That motion was filed before the Commission. It was undecided by the Commission at the time of the transfer in 1978. It went to the trial judge in the Court of Claims and he decided that there was no jurisdictional defense or objection to this, that because of the provisions of Mott's attorney contract, the absence of secretarial or tribal approval, that whatever the intended effect of his 1969 amendment may have been, that it didn't result in the dismissal of any claims, and claims presented in the original petition, having been given timely, the jurisdictional requirements of the 1946 act were fulfilled and the matter could proceed.

It was on appeal from that decision of the Trial Judge Bernhardt that the Court of Claims——

Mr. SHATTUCK. From there on in, it flows. Thank you very much. That was the clarification I sought.

Mr. HALL. We appreciate very much you putting this thorny issue before us. We are not taking any action, of course, today. We have no intention of taking any action today. In all likelihood, both the majority and minority staff will be in contact with all of you gentlemen, including those probably who represent the mining company, the Santa Fe Pacific.

So we appreciate you being here. Certainly we appreciate Mr. Gorman, Mr. Boyd, and Mr. Plummer for their participation. We are glad to see you, and we will be in touch with you at the appropriate time. Thank you very much.

Mr. MUYS. Mr. Chairman?

Mr. HALL. Yes, sir.

Mr. MUYS. May I request that my statement on behalf of the Santa Fe companies be included in the record.

Mr. HALL. It will be made a part of the record.

Mr. MUYS. Thank you.

Mr. HALL. Thank you.

[Whereupon, at 5:10 p.m., the subcommittee proceeded to other business.]